

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO - HBC 346 of 2020

BETWEEN: **ARUNA WATI** of Lot 13 Kuka Place, Nadawa.

PLAINTIFF

A N D: **PHUL SINGH** of Lot 30 Nakasi.

DEFENDANT

Appearance : Ms. Swarvana Prakash for the plaintiff
 Ms. Senjilyn Naidu for the defendant

Hearing : Thursday, 19th May, 2022 at 9.30am

Decision : Friday, 8th July, 2022 at 9.00am

DECISION

A. INTRODUCTION

[01]. The matter before me stems from the plaintiff's amended originating summons filed on 09.03.2021 seeking the grant of the following orders:

[1]. *The Defendant purchase the Plaintiff's half interest in Housing Authority Sub- Lease No. 427073 on a valuation to be obtained mutually or in the alternative Housing Authority Sub-Lease No. 427073 be put on market for sale on the terms and conditions as this Honourable Court deems just;*

[2]. *Any sale ordered by the Court in respect of Housing Authority Sub-Lease No. 427073 is conditional and subject to the consent of Housing Authority as the Lessor.*

[3]. *The Sale proceeds of Housing Authority Sub-Lease 427073 be divided equally amongst the Plaintiff and the Defendant.*

[4]. *Such further and/or other relief as this Honourable Court deems just and expedient and Costs of this action.*

[02]. The originating summons is filed pursuant to section 119(2), (3) and (4) of the Property Law Act, 1971 and under the inherent jurisdiction of the court.

[03]. The Originating Summons is supported by an affidavit sworn by the plaintiff on 25.01.2021.

[04]. The defendant strongly opposed the application and filed an affidavit in opposition sworn on 15.12.2021.

[05]. I note with concern that the plaintiff did not file an affidavit in reply, a course which she was entitled to take.

[06]. The plaintiff and the defendant were heard on the summons. They made oral submissions to court. In addition to oral submissions, counsel for the plaintiff and the defendant filed written submissions, for which I am grateful.

(B) BACKGROUND

[01]. The plaintiff and the defendant are joint lessees of the property comprised in Housing Authority sublease No. 427073. **(Annexure AW-2 referred to in the affidavit of Aruna Wati, the plaintiff sworn on 25.01.2021)**. The property in question was acquired during the marriage and therefore it is a matrimonial property. The parties legally married on 08.12.1983 and the marriage has been dissolved on 27.06.2010

[02]. By way of an originating summons the plaintiff seeks an order that the property comprised in Housing Authority sublease No. 427073 be sold on the market value and the proceeds be shared equally, **alternatively**, the defendant to buy out the plaintiff's share.

- [03]. The defendant is residing on the property and object to the sale of the property.
- [04]. In order to give a better picture of the matter, I can do no better than set out here under the pleadings/ affidavits.
- [05]. The plaintiff in her affidavit in support deposed inter alia that:
- [1]. *I am the Plaintiff in this action.*
- [2]. *A copy of my joint FNPF and TIN identification card is annexed and marked "AW-1".*
- [3]. *I am one of the registered proprietor of the leasehold property comprised and described in Housing Authority Sub Lease No. 427073 being on Lot 30 on Deposited Plan No.7781 situated at the province of Naitasiri have an area of 274 square meters ("Lease"). Annexed hereto is a copy of Housing Authority Sub Lease No. 427073 marked "AW-2".*
- [4]. *The Defendant is also a registered proprietor in the property.*
- [5]. *The Defendant and I own the property as tenancy in common.*
- [6]. *The Defendant and I were legally married on the 8th August 1983.*
- [7]. *Our marriage had broken down irretrievably because of the physical and emotional abuse by the Defendant.*
- [8]. *Since 2008 I had not returned to the Property.*
- [9]. *I received the Conditional Order of Dissolution of Marriage between the Defendant and I on the 26th of May 2010 and the same became final on the 27th of June 2010. Annexed hereto is a copy of Conditional Order of Dissolution of Marriage marked "AW-3".*
- [10]. *The Defendant and I have 3 daughters of our marriage.*
- [11]. *The Defendant has remained in the property from the date of our separation.*
- [12]. *The Lease was bought by the Plaintiff and Defendant sometimes in 1999 and the same was transferred under their names on the 9th of August 1999.*

- [13]. *At the time of purchase, the Lease comprised of a dwelling house consisting of 3 bedrooms, one living room, one kitchen, one toilet and bathroom.*
- [14]. *A few years after the purchase of the Lease the Plaintiff and the Defendant demolished the dwelling house to reconstruct a double storey consisting of 4 flats.*
- [15]. *To finance the reconstruction of the double storey consisting of the 4 flats, the Defendant and the Plaintiff has taken a loan from Housing Authority.*
- [16]. *At the time the Lease was purchased the Plaintiff worked as a Chef at the Hari Krishna and she used her wages to cater for the day expenses of herself, the Defendant and their children whilst the Defendant contributed \$250 per month towards the payment of the Loan.*
- [17]. *The Defendant made contributions towards the repayment of the Loan for about 3 months until the construction of the double storey house was completed and 3 flats were put on rent.*
- [18]. *Since I had left the property in 2008 I had not received any benefit from the property.*
- [19]. *At the moment I am unemployed and I live with my daughter who financially supports me.*
- [20]. *The Defendant and I cannot resume living together since we have both moved on with our lives. The only solution I have come to is to have this property sold and the proceeds shared amongst us.*
- [21]. *My solicitors had written to Housing Authority seeking consent to file these proceedings and I have obtained consent of Housing Authority accordingly as required by clause 2 of the Housing Authority Sub -Lease No. 427073. Annexed hereto is a copy of the Letter from my solicitors and an email from Authority Secretary and Legal Counsel of Housing Authority confirming consent marked "AW-4".*
- [22]. *Now since the Defendant and I cannot live together and there is no chance of us getting back together I seek order in terms of the originating summons filed herein.*
- [06]. In opposition, the defendant in his affidavit in opposition deposed inter alia that:

- [1]. *I depose matters in this affidavit on the basis of my own personal knowledge and where not so, I verily believe the same to be true to the best of my knowledge and belief.*
- [2]. *Through the contents set out in this Affidavit, I will outline my opposition to the contents of the Affidavit of Ms Aruna Wati ("Affidavit"), sworn and filed on the 17th of November 2020 and thereafter outline my opposition to the orders sought in the Originating Summons filed on the 9th of March 2021.*
- [3]. *Save as to the parts hereinafter expressly admitted, the rest of the contents of the Affidavit are denied.*
- [4]. *I have no issues with Paragraphs 1, 2, 3, 4, 5, 6 of the Plaintiff's Affidavit.*
- [5]. *I deny the contents set out in paragraph 7 of the Affidavit.*
- [6]. *I agree with Paragraph 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 of the Affidavit.*
- [7]. *In responding further to the contents set out in Paragraph 7 of the Affidavit, I State that our marriage broke down irretrievably because the lady was involved with another man, a bus driver this had led to a lot of complications in our Marriage.*
- [8]. *In responding further to contents set out in Paragraph 8 of the Affidavit, I state that the lady abandoned the property in the year 2008 on her own free will.*
- [9]. *That I had attempted to persuade the lady to return home for the sake of our three daughters, however this proved futile.*
- [10]. *That we were granted a Dissolution of Marriage on the 26th May 2010.*
- [11]. *That the lady applied for matrimonial property distribution in February 2017 this immediately after I cleared all the home loan in the month of January 2017(refer to **annexure at paragraph 20**) with housing authority, hence why her application was declined for being out of time. (**Annexed herein is a copy of the submission in which she sought leave to file outside time marked "PS 1"**)*
- [12]. *That I disagree to contents of paragraph 12, and seek to state that I purchased the property in the year 1998, this same year consent was granted and the Transfer was executed. **Annexed herein is a copy of***

**Letter confirming consent for Transfer from Housing Authority Manager
Legal Dated 30 December, 1998 marked "PS-2".**

- [13]. *During the time this property was purchased, the structural development consisted of a small corrugated iron and timber, made of a two bedroom dwelling, with one Kitchen, Toilet and bathroom refer to annexure at paragraph 17.*
- [14]. *That I worked as a sales person and used my savings to purchase this property in the year 1998, this time the lady was unemployed. I initially purchased a property in Labasa, after selling that property I used the proceeds to purchase our second property in Bau Road Nausori, after selling this property, I used the proceeds to purchase the current property in Nakasi.*
- [15]. *I joined her name to the title to enable us to receive a grant of home loan from Housing authority.*
- [16]. *That on the 1st March 1999, I engaged a valuation company namely "Fairview Valuations, who provided me with a valuation report of the property as Land Value being \$9600.00, Structural Improvements being \$12,000.00, total valuation was for \$21, 600.00. **Annexed herein is a copy of Valuation report from Fairview Valuations marked "PS-3".***
- [17]. *That in responding to contents in paragraph 14 I seek to state that I strongly disagree that a few years later I built a 4 bedroom flat, that on the 7th May 2005, a building inspector from Housing authority provided me with a "**Engineers Inspection Report**" in which it is clearly stated that in the above time frame , I only had built a two storey structure with two flats (Top Floor) timber and iron (Ground floor) (newly built reinforced concrete structure) **Annexed herein is a copy of the "Final Engineers Inspection Report" dated 7th May 2005 marked "PS-4".***
- [18]. *That in the year 2003 I made an application to the Nausori Town council seeking permission to further develop the property. **Annexed herein is a stamped copy of "Application for Development Permission marked "PS-5".***
- [19]. *In responding further, I wish to state that I applied for Housing assistance from my FNPF in the sum of \$4, 691.00 to use towards restructuring and rebuilding the property in the year 2004. **Annexed herein is a copy of the FNPF Charge Documents marked "PS-6".***

- [20]. *That in the year 2004, I also applied for a home loan via mortgage with Housing Authority of Fiji in the sum of \$18, 703.50, at this time I worked as a sales man. I participated in all repayments from my pay solely. I completed all repayments solely and paid of a total \$23, 736.90 by the year 2017 including interest. **Annexed herein is a copy of the Status report from Housing Authority marked "PS-7".***
- [21]. *Repayment of matters mentioned in paragraph 20 was completed in the year January 2017.*
- [22]. *This loan was used to revamp the property and improve the two storey structure, **refer to Engineers inspection report at paragraph 17.***
- [23]. *From the year 2005 to 2008 the said property consisted of a two storey, two flats structure, top floor was timber and iron whilst ground floor was concrete, **refer to Engineers inspection report at paragraph 17.***
- [24]. *In the year 2008, the Lady left the property as mentioned in paragraph 8 of her affidavit.*
- [25]. *That I spent another \$28, 400.00 through a Building Solution Company to further improve the property in the year 2010 to extend a new flat. **Annexed herein is a confirmation from director of Vishal's Building Solutions, marked "PS-8".***
- [26]. *That I have spent around \$6000.00 in clearing property rates and around \$1, 853.36 as Garbage fee from the year 2012-2021. **Annexed herein is a copy of receipts and invoices for the same from Nausori Town Council, marked "PS-9".***
- [27]. *That in the year 2014 I paid an additional \$1280.00 on erecting a fence in the said property. **Annexed herein is a copy of an approved Application for permission to build by Nausori Town Council marked "PS 10".***
- [28]. *That from the year 2008-2021 I have personally spent a total of around \$15, 000.00 on estimate of receipts attached on building materials for renovation and building purposes. However I also have receipts that are now faded off ink but have kept for my record purposes. **Annexed herein is a copy of various receipts, marked "PS-11".***
- [29]. *That I have maintained the surrounding of the property from the year 2008 – 2021 I solely at my own time and expense.*

- [30]. *I clearly recall, the lady filed for Matrimonial Property settlement immediately after I paid off the loans with Housing Authority. However, her application failed miserably at the Nasinu Magistrates Court.*
- [31]. *I also state that I had never harassed or inflicted any form of abuse or violence on the Applicant Lady and as such put the Plaintiff to strict proof.*
- [32]. *I neither admit nor deny the contents set out in Paragraphs 18-21 of the Affidavit.*

Dispute

- [33]. *I have spent my entire life's savings on building a very lucrative property, that the Applicant lady is luring towards.*
- [34]. *That as per my calculation I have spent an estimate of \$76, 000.00 till date on the said property.*
- [35]. *Apart from spending money towards purchasing the said property I have carried out renovations, constructions and extensions at my own cost from the year 2008-2021.*
- [36]. *That for the above reasons, I plead to this honourable court to dismiss the Plaintiff's Originating summons and Affidavit in support with costs to the Defendant.*

(C) CONSIDERATION AND THE DETERMINATION

[01]. By amended originating summons dated 09.03.2021, the plaintiff is applying for orders that:

- [1]. *The Defendant purchase the Plaintiff's half interest in Housing Authority Sub- Lease No. 427073 on a valuation to be obtained mutually or in the alternative Housing Authority Sub-Lease No. 427073 be put on market for sale on the terms and conditions as this Honourable Court deems just;*
- [2]. *Any sale ordered by the Court in respect of Housing Authority Sub-Lease No. 427073 is conditional and subject to the consent of Housing Authority as the Lessor.*

[3]. *The Sale proceeds of Housing Authority Sub-Lease 427073 be divided equally amongst the Plaintiff and the Defendant.*

[4]. *Such further and/or other relief as this Honourable Court deems just and expedient and Costs of this action.*

[02]. The plaintiff and the defendant were married for 27 years. The marriage was dissolved on 27.06.2010. The plaintiff and the defendant are joint tenants of the land comprised and described in Housing Authority sub-lease No. 427073, being Lot 30 on deposited plan no. 7781 situated at the province of Naitasiri having an area of 274 square meters. It is common ground that the said property was acquired during the course of the marriage hence it is a matrimonial property. About few years after acquiring the lease, a double storey building consisting of four [04] flats have been erected on the demised land. The defendant continued residing in the property after the breakdown of the relationship in 2008.

[03]. The said 119(2) of the Property Law Act 1971 under which the plaintiff's application is made provides: -

(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.*

[04]. The application here is primary under section 119(2) of the Property Law Act 1971 under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be *"for the benefit of the parties interested"*. Section 119(2) clearly specifies the circumstances under which the court make an order for sale notwithstanding the dissent or disability of any other party provided that *"the sale would be for the benefit of the parties concerned"*.

[05]. As borne out by the affidavit in opposition of the defendant sworn on 15.12.2021, the defendant has advanced the following reasons as to why an order for sale of the land should not be made [Reference is made to paragraph 11, 12, 13, 14, 15, 16, 17, 19, 20, 25, 26, 27, 28, 29, 30, 31, 34 and 35 of the affidavit in opposition.]

[11]. *That the lady applied for matrimonial property distribution in February 2017 this immediately after I cleared all the home loan in the month of January 2017(refer to annexure at paragraph 20) with housing authority, hence why her application was declined for being out of time. (Annexed herein is a copy of the submission in which she sought leave to file outside time marked "PS 1")*

[12]. *That I disagree to contents of paragraph 12, and seek to state that I purchased the property in the year 1998, this same year consent was granted and the Transfer was executed. Annexed herein is a copy of Letter confirming consent for Transfer from Housing Authority Manager Legal Dated 30 December. 1998 marked "PS-2".*

[13]. *During the time this property was purchased, the structural development consisted of a small corrugated iron and timber, made of a two bedroom dwelling, with one Kitchen, Toilet and bathroom refer to annexure at paragraph 17.*

[14]. *That I worked as a sales person and used my savings to purchase this property in the year 1998, this time the lady was unemployed. I initially purchased a property in Labasa, after selling that property I used the proceeds to purchase our second property in Bau Road Nausori, after selling this property, I used the proceeds to purchase the current property in Nakasi.*

[15]. *I joined her name to the title to enable us to receive a grant of home loan from Housing authority.*

[16]. *That on the 1st March 1999, I engaged a valuation company namely "Fairview Valuations, who provided me with a valuation report of the property as Land Value being \$9600.00, Structural Improvements being \$12,000.00, total valuation was for \$21,600.00. Annexed herein is a copy of Valuation report from Fairview Valuations marked "PS-3".*

[17]. *That in responding to contents in paragraph 14 I seek to state that I strongly disagree that a few years later I built a 4 bedroom flat, that on*

the 7th May 2005, a building inspector from Housing authority provided me with a **"Engineers Inspection Report"** in which it is clearly stated that in the above time frame , I only had built a two storey structure with two flats (Top Floor) timber and iron (Ground floor) (newly built reinforced concrete structure) **Annexed herein is a copy of the "Final Engineers Inspection Report" dated 7th May 2005 marked "PS-4"**.

- [19]. In responding further, I wish to state that I applied for Housing assistance from my FNPF in the sum of \$4, 691.00 to use towards restructuring and rebuilding the property in the year 2004. **Annexed herein is a copy of the FNPF Charge Documents marked "PS-6"**.
- [20]. That in the year 2004, I also applied for a home loan via mortgage with Housing Authority of Fiji in the sum of \$18, 703.50, at this time I worked as a sales man. I participated in all repayments from my pay solely. I completed all repayments solely and paid of a total \$23, 736.90 by the year 2017 including interest **Annexed herein is a copy of the Status report from Housing Authority marked "PS-7"** .
- [25]. That I spent another \$28, 400.00 through a Building Solution Company to further improve the property in the year 2010 to extend a new flat. **Annexed herein is a confirmation from director of Vishal's Building Solutions, marked "PS-8"**.
- [26]. That I have spent around \$6000.00 in clearing property rates and around \$1, 853.36 as Garbage fee from the year 2012-2021. **Annexed herein is a copy of receipts and invoices for the same from Nausori Town Council, marked "PS-9"**.
- [27]. That in the year 2014 I paid an additional \$1280.00 on erecting a fence in the said property. **Annexed herein is a copy of an approved Application for permission to build by Nausori Town Council marked "PS 10"**.
- [28]. That from the year 2008-2021 I have personally spent a total of around \$15, 000.00 on estimate of receipts attached on building materials for renovation and building purposes. However I also have receipts that are now faded off ink but have kept for my record purposes. **Annexed herein is a copy of various receipts, marked "PS-11"**
- [29]. That I have maintained the surrounding of the property from the year 2008 – 2021 I solely at my own time and expense.

[30]. *I clearly recall, the lady filed for Matrimonial Property settlement immediately after I paid off the loans with Housing Authority. However, her application failed miserably at the Nasinu Magistrates Court.*

[31]. *I also state that I had never harassed or inflicted any form of abuse or violence on the Applicant Lady and as such put the Plaintiff to strict proof.*

[34]. *That as per my calculation I have spent an estimate of \$76, 000.00 till date on the said property.*

[35]. *Apart from spending money towards purchasing the said property I have carried out renovations, constructions and extensions at my own cost from the year 2008-2021.*

[06]. I note with concern that the plaintiff did not file an affidavit in reply to the defendant's affidavit in opposition. It is a course which the plaintiff was entitled to take. She should reply, if indeed she had a reply. And in the circumstances, in the absence of reply, I hold the inference inescapable that what the defendant has said to be true. **Jai Prakash Narayan v Sarita Chand**,¹

[07] The issue for the court's determination is whether on the facts and circumstances of this case the application for sale of the property ought to be granted to the plaintiff or not under section 119(2) of the Property Law Act under which the application is made.

[08]. As I understand the defendant's affidavit in opposition, his concern is about the money he expended on erecting a dwelling on the demised land and renovating, revamping, maintaining and extending the dwelling. **It appears to me that the defendant has a claim in equity and he is at liberty to pursue it and it does not in any way affect the determination of the issue before me in this summons.**

[09]. On the evidence, I find that the defendant has not advanced any good reason why an order for sale in the demised land should not be made.

[10]. The defendant's claim in equity will not defeat the plaintiff's right to obtain an order from the court to sell the demised land in terms of section 119(2) of the Property Law Act, 1971. The fact that the plaintiff's application for settlement of

¹ FCA, Civil Appeal No. 37 of 1985. Judgment 08.11.1985.

property was declined by the Family Magistrate Court will not defeat the plaintiff's right to obtain an order from the court to sell the demised land.

- [11]. In this case, if sale is not ordered, inconvenience to the plaintiff is greater. Since 2008, the defendant has been deriving all the benefits from the property to the exclusion of the plaintiff. The defendant is enjoying the entire property and deriving all the interests from the property which is not proportionate to his interest. No joint tenant has an exclusive right to possession of any particular land which is held on joint tenancy. Each joint tenant is just as much entitled to possession of all of the land as the other.²
- [12]. The plaintiff and the defendant had obtained **right of survivorship** as joint tenants and upon the death of one person, the surviving person becomes the sole proprietor. The sale would be for the benefit of the plaintiff and the defendant. This court thinks that the sale would be advantageous for the parties interested.
- [13]. In those circumstances the plaintiff is entitled to an order for sale she is seeking, but the court cannot make an order for equal distribution of sale proceeds because there is a claim in equity. **The plaintiff has proved on the affidavit evidence that section 119(2) is available to her.**
- [14]. Objections of the defendant for sale is overruled and the sale of the property is allowed under the following conditions:


ORDERS

- [01]. That within seven [07] days from the date of this decision, the plaintiff appoint a valuer to carry out a valuation of the property comprised in Housing Authority sub-lease No. 427073.
- [02]. The Valuer to be acceptable to the defendant's solicitors.
- [03]. Upon receipt of the Valuation report, the parties to agree to a selling price which is not to be below the valuation amount.

² Hinde Mcmorland & Sim, Land Law New Zealand.

- [04]. In the event the parties not being able to agree to the selling price, then the Chief Registrar to appoint an Arbitrator within seven [07] days of the disagreement.
- [05]. The Arbitrator's decision on the selling price shall be final and conclusive.
- [06]. Once the selling price is agreed, all necessary documents for transfer shall forthwith be prepared by the plaintiff's solicitors who shall forward the same to the defendant's solicitors to obtain the client's execution.
- [07]. Forthwith upon settlement, the plaintiff's solicitors shall deposit the proceeds of sale in the **High Court of Suva Judicial Trust Account**.
- [08]. Forthwith upon settlement, the plaintiff's solicitors to furnish to the Chief Registrar an account of disbursement and costs related to the sale of property. All costs of transfer shall be equally borne out by the parties.
- [09]. Within 14 days upon depositing the proceeds of sale in the **Judicial Trust account in the High Court of Suva**, the defendant to commence proceedings by writ in respect of his claim in equity.
- [10]. The sale ordered by the court in respect of the Housing Authority sub-lease No. 427073 is conditional and subject to the written consent of the Housing Authority as the lessor.
- (11) I make no order as to costs of these proceedings.




08/07/2022
Jude Nanayakkara
[Judge]

High Court - Suva
Friday, 8th July, 2022