

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 171 of 2019

Rameshwaran Nair

Plaintiff

v

Raajeshwaran Nair

Defendant

Counsel: Mr A. Chand for the plaintiff

The defendant in person

Date of hearing: 6th April, 2021

Date of Judgment: 30th May, 2023

Judgment

1. This originating summons is made in terms of sections 119 to 122 of the Property Law Act. The plaintiff and defendant are registered proprietors of CT 10153, Lot 4 on DP 2337 at 105 Laucala Bay Road, Suva, (property) in equal shares.
2. The plaintiff, in his affidavit in support states that the property consists of 6 flats. The defendant occupies one. The defendant took control of the property and made decisions without consulting him, since he is overseas. He has not provided details of the income generated from the tenancy of the property. He takes the rental income for his personal use. The plaintiff states that he fears he could lose his share, if the defendant continues to be in charge of the property. The defendant agreed to pay 1 million dollars to ANZ, but he is not paying towards the mortgage of the property.

3. The plaintiff seeks that the defendant provide and file audited accounts for the rental monies collected from 2009 to-date; the property be valued with the cost of valuation to be shared equally; the defendant provide the keys of the property to the plaintiff or his solicitors; the plaintiff or its solicitors inspect and compile necessary reports; and, the rent collected from 2019 be deposited in the trust account of his solicitors.

4. The defendant, in his affidavit in opposition states that he occupies the family home. The rest of the property is rented periodically. The parties borrowed money from ANZ Bank to develop the property to 5 high end executive apartments. The initial loan of \$230,000.00 was increased by two additional loans to \$730,000.00 and secured by a registered mortgage of the property. The plaintiff left Fiji without informing him. The project was not completed. The account fell into arrears. The plaintiff wrote to him that in the event he took over the entire ANZ and Courts loan, he will transfer his interest to him. He cleared the ANZ arrears of \$22,348 in March, 2009, and is making \$5,300 to \$5,600 monthly repayments. Consequent to an advertisement of mortgagee sale of the property, ANZ entered into a Deed of Settlement with the plaintiff and defendant. Subsequently, the successful tenderer brought proceedings against ANZ Bank. The defendant obtained an injunction restraining sale and entered into terms of settlement to pay ANZ a global sum of \$1,000,000.00 to redeem the mortgage. He has paid instalments totaling \$230,000.00 and is obliged to make further repayments of \$770,000 to clear the mortgage debt.

5. The defendant seeks an order for the sale of the plaintiff's interest in the property to him. Alternatively, for a determination of the price to purchase the plaintiff's interest and in default of an agreement of the purchase price, the Court make order to determine a just and fair price for the purchase of the plaintiff's interest.

6. The plaintiff, in his reply states that the defendant is occupying a new flat, not the family home. He used monies from the loan for his personal use. The plaintiff states that he stopped repaying the loan, as the defendant was not willing to rent the flats to tenants selected by him.

The determination

7. The plaintiff seeks accounts of the rental income of the property, a valuation of the property and the rent collected to be deposited in the trust account of his solicitors. Both parties desire to buy the other's share.
8. Section 119 of the Property Law Act reads as follows:
 - 1) *Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly.*
 - 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 parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstances, a sale of the land would be for the benefit of the parties interested.***
 - 3) ***The court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale, and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.***
 - 4) *On directing any such sale or valuation to be made, the court may give also all necessary or proper consequential directions.*
 - 5) *Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further considerations, provided that all persons who, if this Act had not been enacted, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of court, apply to the court to add to the decree or order.*
 - 6) *On any sale under the provisions of this section, the court may allow any of the parties interested in the land to bid at the sale, on such terms as the court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters. (emphasis added)*

9. Section 119(2) gives the Court discretion to order a sale in any circumstance where it would be for the benefit of the parties.

10. Pathik J in *Thomas v Estate of Eliza Miller*, [1996] 42 FLR 268 (12 December, 1996) stated that:

.section 119(2) clearly specifies the circumstances under which the Court could 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.

Pathik J cited Middleton J in *Morris v Morris*, (1917) 12 OWN. 80 at p.81 as follows:
"Sale as an alternative for partition is quite appropriate when a partition cannot be made."

11. Amaratunga J in *Subhan v Subhan*, [2023] FJHC 143; HBC274.2021 (28 February, 2023) stated :

Section 119(2) of Property Law Act 1971, does not create a right to a co- owner for a sale. It only grants a co-owner to seek such an order from court. The power granted to the court in terms of Section 119(2) .., is discretionary. Hence the exercise of that depend on various factors. Some of such factors are given and nature of the property is one such factor but this is not an exhaustive list of factors as they can be 'any other circumstances'..

12. Section 119(3) provides that a party may undertake to purchase the share of the party requesting a sale.

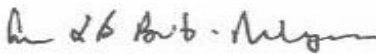
13. In the present case, the defendant has the sole benefit of occupying the property and the rentals received. No evidence has been provided by the defendant of the rent received. There is a mortgage on the property and the defendant is not repaying the loan.

14. In the circumstances, in my view, it is expedient to order a sale of the property. Either party may purchase the other's interest on a valuation to be obtained.

15. **Orders**

I make orders as follows:

- (i) The defendant shall provide the plaintiff with accounts of the rental monies obtained from 2009 to-date on or before 23rd June,2023.
- (ii) The defendant shall permit the plaintiff or its solicitors to inspect the property.
- (iii) The property, CT 10153, Lot 4 on DP 2337 at 105 Laucala Bay Road, Suva shall be sold.
- (iv) The plaintiff shall appoint a Valuer to carry out a valuation of the property on or before 30th June,2023. The Valuer shall be acceptable to the defendant.
- (v) Either party may make an offer to purchase the other's share. I give the parties time in that regard, till 30th September,2023.
- (vi) If neither party is in a position to purchase the property, the plaintiff shall advertise the property for sale by public auction in two issues of a local newspaper on weekends. The tender shall be opened in the presence of the defendant or his solicitor. The sale shall be to the highest tenderer.
- (vii) On the tender being accepted, all necessary documents including the transfer shall forthwith be prepared by the plaintiff 's solicitors, who shall forward same to the defendant for his execution and hold same until the purchaser is in a position to settle.
- (viii) Parties are free to engage an independent real estate agent to conduct the sale.
- (ix) The Deputy Registrar shall execute the transfer if any of the parties fail to do so.
- (x) Forthwith upon settlement, the plaintiffs' solicitors shall pay into Court the settlement moneys and furnish an account of disbursements and all costs incurred in the sale with documentary evidence.
- (xi) The proceeds remaining shall be distributed equally between the parties.
- (xii) Liberty to parties to apply generally.
- (xiii) I make no order as to costs.


A.L.B. Brito-Mutunayagam
JUDGE
30th May, 2023

