

RULING

Introduction

1. The parties in this case are the registered owners of a property, CT 13506, being Lot 102 on DP 3291 containing 35 and one eighth of a perch in the District of Naitasiri, Island of Viti Levu (the "Property"). The property is at Godfrey Road, Kalabu, Nasinu.
2. The parties were married in 2016 and moved to Australia where the Plaintiff is a citizen. Since moving to Australia, the Plaintiff has now become a permanent resident.
3. The parties were divorced in Australia after being married for about 4 years.

HBC 361 OF 2023 ROZEEN SHARNIA PRASAD V MAHESHWAR PRASAD

4. On 4th December 2023, the Plaintiff/lady filed an originating summons (Civil Case HBC 361 of 2023) seeking *inter-alia* **an order the property be sold and that the net proceeds be shared equally between the parties. The application was made pursuant to Order 31 of the High Court Rules and Section 119 of the Property Law Act 1971.**
5. The court granted leave to the Plaintiff in HBC 361 of 2023 in to have the matter served overseas on the ex-husband and he was duly served, and an affidavit of service was filed on 13th February 2024. On 30th April 2024 and in the presence of both counsels, the court ordered the Defendant to file an affidavit in opposition by 17th May 2024 and a reply by 7th June, with a hearing date of 30th August 2024. On 22nd July 2024, the hearing date was vacated by the court and the Defendant was ordered to file his affidavit in opposition by 21st July 2024 with a reply by 12th August. A new hearing date of 14th November 2024 was given. I inherited the file on 19th May and was referred to a letter from Counsel for the Plaintiff on the file. The letter dated 25th October 2024 stated that despite the court's directions above, the Defendant failed to file his affidavit in opposition on time and complained that it was accepted by the Registry without leave of the Court. The Writer then asked that the affidavit be struck out. There is no copy of the said affidavit on file HBC 361 of 2023.
6. An application for an affidavit to be expunged from the record should be made in chambers or in court and cannot be made via a letter. In any case, the point is moot in view of the developments in the case and the decision in this ruling.

7. The matter had been set down for hearing before Justice Amaratunga on 14th November 2024, but the hearing was vacated by the court as there were older files that took precedence over HBC 361 of 2023.

THE WRIT – HBC 44 of 2025 MAHESHWAR PRASAD v ROZEEN SHARNIA PRASAD

8. On 20th January 2025, Maheshwar Prasad, the Defendant in HBC 361 of 2023 filed a Writ, HBC 44 of 2025 in the High Court in Suva. The claim in the Writ is for the same property which is the subject of the Originating Summons in HBC 361 of 2023, namely, CT 13506 identified as Lot 102 on Deposited Plan 3291, Godfrey Road, Kalabu, Nasinu.
9. On 30th July 2025, I was informed by Defence counsel that his client had filed Writ, HBC 44 of 2025 involving the same parties and the same piece of land which was in another court. I then stayed HBC 361 of 2023 while I called for HBC 44/2025 to study the Writ and deal with both cases together as they cannot proceed at the same time and should not be dealt with by different judges.
10. The Plaintiff/man claims that he purchased the property in 2000; that after he divorced from his then-wife, he met the Defendant and the Defendant made propositions to him before they got married to include transferring 50% of the said property to him; that the Plaintiff to move to Australia and reside with her; that the Plaintiff open a joint bank account with the Defendant as part of his visa application; that all the Plaintiff's income be deposited into the said joint account; that all FNPF funds standing to the credit of the Plaintiff be withdrawn and deposited into the said account; that the joint account be jointly operated by both parties in concurrence with each other; that the Defendant would assist financially in the upkeep and maintenance of the property; that the Defendant would assist financially in paying the upkeep, maintenance and half the rates due on the property; and that they would live together as a married couple.
11. The Plaintiff then claims that based on the said propositions and representations, the parties married and moved to Australia; that they opened a joint account at the Commonwealth Bank of Australia (CBA); that the Plaintiff/man transferred 50% of the property to the Defendant/lady; that he withdrew \$35,000 from his FNPF and transferred it to their joint account in the CBA.
12. The Plaintiff/man continues in the Writ that he made substantial investments in the property, which included renovations, roof replacement of \$30,000; kitchen renovations of \$4,000; that at the time of their divorce in 2021, there was an

outstanding loan of approximately \$60,000 which he continues to pay on his own without any contributions from the Defendant/lady. The Plaintiff/man claims that the Defendant/lady withdrew AUD \$25,000 from their joint account and transferred it to her personal account without his consent.

13. The Plaintiff/man then states that the Defendant/lady is claiming for the property to be sold and for her to get 50% of the proceeds of sale but he is opposing it on the grounds that the property was purchased before their marriage without any contributions from the Defendant/lady.
14. The Plaintiff then pleaded 6 causes of action; namely duress, conversion, fraud, breach of trust; unjust enrichment; and negligent misrepresentation. In his prayers, he is seeking, *inter alia*, a declaration that he is the rightful owner of the property; an order that the Defendant lady repay the AUD \$25,000; an order that the 50% shares in the property transferred to the defendant lady be revoked.
15. The Defendant lady has filed her defence, and it is clear that there are lots of disputed facts which can only be determined after a hearing of oral evidence. There are issues of fact and law involved which cannot be resolved by affidavit evidence.

DISCUSSION

16. HBC 361 of 2023 is an originating summons and the normal procedure is for the evidence to be taken by affidavits. The Plaintiff/lady in HBC 361 of 2023 is seeking that the property be sold and that the net proceeds be shared **equally** between the parties. The Writ in HBC 44 of 2025 shows that the Plaintiff/man does not agree to the sale. There are substantial disputes of fact and law involved, and these cannot be resolved by affidavit evidence and so the matter will have to proceed by way of a Writ. Even if the Plaintiff had not filed a Writ but an affidavit in opposition to HBC 361 of 2023 laying out the facts alleged in the Writ, the court would have considered ordering the Plaintiff/lady there to covert her originating summons into a Writ so that oral evidence would have to be taken to determine disputes of fact.
17. In HBC 361/23, the Plaintiff/lady is seeking orders pursuant to section 119 of the Property Law Act and Order 31 of the High Court Rules.
18. Section 119 of the Property Law Act provides:

In action for partition court may direct land to be sold

“119.-(1) Where in an action for partition the party or parties interested, individually or collectively, to an 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 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.*
- (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.*

19. Order 31 of the High Court Rules 1988, states;

Power to order sale of land (O.31, r.1)

"1. Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the court may direct. In this Order "land" shall include any interest in, or right over, land.

Manner of carrying out sale (O.31, r.2)

(1) *Where an order is made, in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he or she thinks fit, or may direct that the land be sold in such manner as the Court may direct for the best price that can be obtained, and all proper parties shall join the sale and conveyance as the Court shall direct.*

(2) *The Court may give such directions as it thinks fit for the purpose of effecting a sale, including, without prejudice to the generality of the foregoing words, directions-*

(a) *appointing the party or person who is to have the conduct of the sale;*

(b) *fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;*


20. The remedy being sought in HBC 361 of 2023 is the sale of property with a 50-50 share of the proceeds. Before the court can consider the sale of the land and the share of the proceeds, the court must first determine the issue raised in the writ by the plaintiff man that the defendant/lady's shares in the property be revoked. There are other matters raised in the writ that will affect any share of the proceeds of sale should HBC 361/23 be heard. It follows therefore that HBC 44 of 2025 be heard first before HBC 361 of 2023. The court might very well conclude after hearing HBC 44 of 2025 that the land should be sold and proceeds shared pursuant to Order 31 of the HCR or section 1119 of the Property Law Act.
21. In HBC 44 of 2025 the Plaintiff/man is seeking *inter alia* a declaration that the Defendant lady has no rights over the property together with damages as already explained above. Both parties want to have the other's action struck out but that will not satisfy anyone and will lead to appeals and possible rehearing of the matter.
22. The option that is clear to the court in the interests of justice is that HBC 361 of 2023 should be stayed until the Writ in HBC 44 of 2025 is heard as it has the following advantages:
 - a. Witnesses will have to testify and be cross-examined on the evidence, an option not available with originating summons;
 - b. At the hearing of Writ, the court might most likely have to order the sale of the property, in which case the Plaintiff/lady would have achieved the whole or part of the prayers she is seeking;
 - c. The court can be in a better position to judge if there is any reduction and if so, how much to the share to be given to any party;
 - d. The parties right to have their matter determined in a fair trial under section 15(1) of the Constitution would have been satisfied.
 - e. If the plaintiff man fails to prosecute HBC 44 of 2025 diligently, an application can be made by the defendant/lady to have it struck out and for HBC 361 of 2023 to proceed.

Conclusions

23. For the reasons given, the best option is to stay the proceedings in HBC 361 of 2023 until the hearing of HBC 44 of 2025 but subject to conditions that ensure that there is no intentional delay by the Defendant/man.

Orders

1. HBC 361 of 2023 is stayed until the final determination of the Writ HBC 44 of 2025;
2. HBC 44 of 2025 is to be heard before the 31st of March 2026;
3. The hearing date is to be fixed today after the delivery of this ruling.
4. Costs in the cause.


.....
Penijamini R Lomaloma
Acting Puisne Judge

