

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 35 of 2012

BETWEEN : **FALIAH ROSEMINE KHAN** formerly known as Jenny Rosamine Shah
of Momi Nadi Domestic Duties.

Plaintiff

AND : **TAHIR HUSSEIN SHAH** of Nalovo, Nadi, a retired person.

Defendant

Solicitors : Rams Law for the Plaintiff
N/A for the Defendant

R U L I N G

1. The plaintiff and the defendant were a married couple. They married in 1990. However, their marriage was dissolved on 26 August 2004 and they have since gone their separate ways. The plaintiff mentions in passing in her affidavit that there are issues of the marriage but she does not identify them. There is a particular piece of real property which the plaintiff says she and her husband purchased together in 1993 some three years into their marriage. The plaintiff is claiming a 50% interest over this property. In this regard, she filed on 29 February 2012 an Originating Summons seeking the following:
 - (a) An order that the Defendant give immediate vacant possession of the one quarter acre of the Land where their dwelling house is constructed from all that piece and parcel of land which is comprised in Certificate of Title No. 7394 being Lot 14 on DP 1541 known as "Nalovo" (part of) having an area of 7 acres 3 roods 15 perches.
 - (b) A Declaration that the Defendant only has half the interest in the said Land and dwelling house thereon and that the Plaintiff is and has at all material times been entitled to one half interests in the property.
 - (c) An order that the Plaintiff be authorised to sell the said Property by private sale and distribute the proceeds of the sale to the Plaintiff and the Defendant after deducting the expenses incurred in carrying out the sale and after deducting the sum of three thousand dollars (\$3,000.00) purchase price that the Defendant ought to have contributed towards the purchase of the land and after deducting a sum of five thousand four hundred dollars (\$5,400.00) for the use and enjoyment of the property.
 - (d) In the alternative an order that the said property be valued and sold by a real estate agent acceptable to both the Plaintiff and the Defendant and that the proceeds of the sale be distributed equally after deducting the sum of three thousand dollars (\$3,000.00) purchase price that the Defendant ought to have contributed towards the purchase of the land and after deducting a sum of five thousand four hundred (\$5,400.00) for the use and enjoyment of the property.

- (e) An order that all the income from the rental of the said property from hereon be deposited into the trust account of the Plaintiff's solicitors and distributed to the Plaintiff and the Defendant equally.
 - (f) An order that the Defendant pay the costs of this action.
 - (g) Any other or further relief that this Honourable Court deems just and expedient.
2. The Originating Summons is supported by an affidavit sworn by the plaintiff on 28 February 2012.
 3. According to the plaintiff, she and the defendant, as intended purchasers and joint tenants, entered into an agreement in 1993 with one Dharam Lingam (vendor) for the sale and purchase of one quarter acre of vacant land. This one quarter acre was to be carved out from all that piece and parcel of land comprised in Certificate of Title No. 7394 being Lot 14 on DP 1541 known as "Nalovo" (part of) having an area of 7 acres 3 roods 15 perches (hereinafter referred to as "the Land")¹. The agreement stipulated *inter alia* that the purchasers pay the vendor a consideration sum of six thousand Dollars (\$6,000.00) by an initial deposit of two thousand dollars (\$2,000.00). The balance of four thousand dollars (\$4,000.00) was to be paid by instalments of two hundred dollars (\$200.00) per month.
 4. In 1993, upon execution of the said Agreement, the plaintiff and her husband took possession of the land. The plaintiff asserts that although she and the defendant had agreed that they would jointly contribute to the payment of the purchase price, she ended up paying the entire purchase price on her own. She deposes:

The Defendant failed to pay his share of purchase price in the sum of \$3,000.00. That I had also paid the initial deposit in the sum of \$2,000.00 to the Vendor and it was I alone who paid the entire balance sum of \$4,000.00 by instalment payments. A copy of the Receipts issued by the Vendor in my name is annexed hereto and marked as "FRK2".
 5. The plaintiff says however that she and the defendant, using common funds, would go on to build a single storey house on the land together. They would raise their children in that house together.
 6. However, in June 2004, the defendant threw her and the kids out of the house and was either living on the property or renting it out.

¹ A copy of the said Sale & Purchase Agreement is annexed to her affidavit and marked as "FRK1".

12. That in or about June 2004 the Defendant forcefully and unlawfully evicted me and our two young children of the marriage out of the said family home.
 13. That since in or about June 2004 the Defendant alone has been either living in the said property or has been renting the same and deriving rental income from the Property.
 14. That after the Defendant forcefully evicted me and our young children I initially lived with my parents for a short while but thereafter from in or about the year 2005 I rented a property at Nadi at a rate of \$150.00 per month.
7. The plaintiff asserts her interest over the property and any rental income derived from it in the following terms:
15. That as the joint tenant of the Property I am and at all material times was entitled to one half interests in the Land and the dwelling house thereon.
 16. That I am and was at all material times entitled to use and occupation of the Property and or to the rental income and or *mesne* profit there from.
 17. That despite repeated requests the Defendant has failed to allow me possession of the property and has failed to sell the property and give half the proceeds of to me.
 18. That the Defendant has failed to give me any rental income or *mesne* profit for the same. He has failed to account for the same to me.
 19. That the just distribution of the Property requires it to be sold and the proceeds of the sale distributed to me and the Defendant after deducting my initial contribution for the purchase price which I paid.
 20. That the Defendant has derived an income of \$150.00 per month for the last six years and as such gained in the sum of \$10,800.00 for the property from which I am entitled to \$5,400.00 or alternatively that the market rental value of the property has been the sum of \$150.00 per month for the last six years.
 21. That I pray for Orders in terms of my application.
8. It would appear that the defendant no longer lives on the property in question. On 30 July 2012, the plaintiff filed an *ex-parte* notice of motion pursuant to Order 65 Rule 4 of the High Court Rules seeking to effect service of the Originating Summons and Acknowledgement of Service by way of substituted service. On 03 August 2012, I granted leave to the plaintiff to effect service of the originating summons and supporting affidavit and acknowledgement of service by advertisement in the Fiji Sun.
9. An Affidavit of Service sworn by Barbara Dotton on 30 August 2012 was filed in Court on the same day. In that affidavit, Ms Dotton annexes an extract of an advertisement in the Fiji Sun's issue of 11 August 2012. The on 10 September 2012, the plaintiff filed a Notice of Appointment To Hear Originating Summons. On 29 October 2012, the plaintiff filed an Ex-Parte Notice of Motion supported by an affidavit that she had sworn on 24

October 2012. These two were served by way of advertisement in the Fiji sun's issue of 20 November 2012.

10. The property in question, being a ¼ acre, was to be carved out of that 7-acre plus piece of real property which is described above. The said Dharam Lingam is the registered proprietor of the said 7-acre plus property. There is no evidence before me to suggest that the said ¼ acre parcel of land that the plaintiff and her former husband are squabbling over, was ever formally created in their favour out of a formal subdivision of Lingam's 7-acre plus property. All that the plaintiff relies on is an unstamped and undated copy of an old document entitled *Memorandum of Terms And Sale*. She also annexes to her affidavit some twenty (20) receipts which record twenty regular *end-of-the-month* payments of \$200 each from January 1994 to August 1995. These do not prove anything in terms of the kind of proprietary interest she must have in order to be entitled to the kinds of orders she seeks from this court. I note also that amongst the clauses in the said *Memorandum of Terms And Sale*, is the following:

Transfer of Property : Upon payment of purchase price and all other moneys payable hereunder, the Vendors will transfer free of encumbrance or charges to the Purchasers the said land and chattels and will make do execute and perform all acts, deeds and things necessary to vest the said land unto the Purchasers name. All costs and expenses incidental to such transfer shall be paid by the Purchasers and all the costs and expenses of this agreement shall be paid by the purchasers.

11. The kind of orders that the plaintiff seeks presuppose that she and the defendant are already legal owners of the land in question. There is nothing in her affidavit to confirm this. The plaintiff must first establish a clear interest in the land as against Dharam Lingam in a separate proceeding before she can start to dream about getting the orders she seeks in this case.
12. I dismiss the plaintiff's Originating Summons. No order as to costs.



Anare Tuilevuka
JUDGE
13 May 2016.