

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No.: HBC 323 OF 2016**

**BETWEEN** : **NELSON KWAN** of 88 Milverton Road, Raiwaqa, Suva.

**PLAINTIFF**

**AND** : **BYRON KWAN** of 88 Milverton Road, Raiwaqa, Suva.

**1<sup>ST</sup> DEFENDANT**

**AND** : **KAREN KWAN** of 88 Milverton Road, Raiwaqa, Suva.

**2<sup>ND</sup> DEFENDANT**

**Appearance** : **Ms. M. Rakai for the Plaintiff**

**In Person for 1<sup>st</sup> Defendant**

**Ms. Nayacalevu for the 2<sup>nd</sup> Defendant**

**Date of Hearing** : **29<sup>th</sup> June, 2017**

**Date of Judgment** : **26<sup>th</sup> July, 2017**

**JUDGMENT**

**INTRODUCTION**

1. This is an Originating Summons filed by the Plaintiff seeking valuation of a property under joint tenancy between the three siblings, who are parties to this action and sale of the same. The Defendants vehemently object to the sale of the property. All the parties are living in the same property while some flats are being rented. 2<sup>nd</sup> Defendant is a person who needs some special caring and attention and in the last will of late Kwan Chew Kuvan, the late father, referred to her as 'invalid' daughter. This property was owned by their late father. According to the undisputed Psychiatrist Report 2<sup>nd</sup> Defendant is capable of participating in legal action, but her ability to manage finance needed further assessments, and no such further assessment was available at hearing.

## FACTS AND ANALYSIS

2. The Originating Summons filed by the Plaintiff was filed in terms of Section 119 of the Property Act.
3. The said Originating Summons sought following orders
  - i. An Order that the property comprises in certificate of Title No 9338 being Lot 57 on deposited plan number; 2274 (The Property) be valued by a court appointed valuer and the cost of the valuation be shared equally by the Plaintiff and the Defendants.
  - ii. An order that the Defendants be given an option to buy out the Plaintiff's one third share of the valuation in (1); or
  - iii. Alternatively, and order that the property comprised in Certificate of Title No. 9338 being Lot 57 on deposited plan number; 2274 be sold by the Plaintiff by tender to the highest tenderer and in the event the Defendants refuse to execute the instrument of Transfer, the Acting Chief Registrar of the High Court execute the said instrument of Transfer and all other documents in place of the Defendant.
  - iv. An order that all sale proceeds be deposited in Court.
  - v. An order that after deduction of costs, the net proceeds of sale to be shared equally between the parties.
  - vi. Until the sale of said property, all further rental monies be collected by the Plaintiff as in the status quo.
  - vii. Such further or other reliefs.
4. The Property in issue is a building owned previously by late Kwan Chew Kuvan. Parties to this action are issues of said Kwan Chew Kuvan and they lived in it. At the moment they live in that property and some flats are being rented and income is generated too.
5. Late Kwan Chew Kuvan died in 2003 surviving his wife and three children. This property was part of the estate of Kwan Chew Kuvan and wife and three children inherited it accordingly.
6. After demise of mother in 2013, the parties to the action, who are issues of her, became the only joint tenants of the property.
7. The Plaintiff who was one of the two executors of the estate of Kwan Chew Kuvan was removed by court order in 2015.



8. After he was restrained from collecting rents from the Property, he had filed this action for the sale of it in terms of Section 119 of the Property Act.
9. This action for sale of the Property was only supported by one joint tenant, whereas remaining two objected to it.
10. The Plaintiff who was the executor and also as the person who collected rentals from the Property till he was restrained, never sought to sell the Property for nearly 15 years. This request for sale and reasons adduced were not new, but were on going for some time. The most recent event regarding the Property, is distribution of rental proceeds equally, which did not happen till intervention of court order in 2017.
11. Section 119 of the Property Act is contained in Part XII of the said Act and states as follows

#### **PARTITION OF LAND AND DIVISION OF CHATTELS**

*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 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 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.*

(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)*

12. Section 119 applies to an action for Partition of the property. In an action for Partition the court can make an order for sale. The Plaintiff has not instituted any action for Partition hence this application needs to be dismissed *in limine*.
13. Without prejudice to what was stated above, there is no right for any joint tenant to compel others for a sale of property under joint tenancy in terms of Section 119(1) of Property Act.
14. The request for sale can only be made by a party or parties who *individually or collectively, to the extent of one moiety or upwards*.
15. The proper meaning of word 'moiety' is half. (See. *Re Angus's Will Trusts; Hall and Another v Angus and Others* [1960] 3 All ER 835.



16. The Plaintiff 's share in the Property is only 1/3 and this is smaller than 1/2 share that is needed for the court to act in terms of Section 119(1) hence this application cannot be made under said provision. Apart from said provision Section 119(2) and 119(3) also grants the court discretion for sale of property owned by joint tenants.
17. In an action for Partition, the Court may direct a sale under Section 119(2) or 119(3) of Property Act upon a request by any interested party. If the court thinks that sale would benefit the parties court can order a sale in terms of Section 119(2) of Property Act. Even though both provisions do not specifically mention of an 'action for partition' the contextual interpretation, of the said provision is that said provisions are to be applied in an action for partition.
18. Since there was no action for Partition of the Property it is premature to consider whether sale of the Property would be in the benefit of all the parties at this moment. It is also logical to consider partition of a jointly owned property, before a sale, when majority of the joint tenants oppose sale of the Property.
19. Even in such an action for partition, the court needs to assess what is best for all the interested parties, and not only a minority view.
20. From 2003, though the Property was transferred to the beneficiaries in terms of the Last Will, the income from the Property was not distributed to joint tenants for more than a decade and collected by Plaintiff.
21. The Defendants are demanding their shares from the said rental proceeds. This is not a reason to prevent sale.
22. At the moment all joint tenants, including the Plaintiff, are receiving the income from the Property. If the sale of the Property was in the best interest of all the parties why a request for sale, had to wait all this time was not explained by the Plaintiff. All the events contained

- in the affidavit in support, existed and going on for some time, and perhaps was a result of Plaintiff's own action of not distribution of rental proceeds for over 15 years.
23. So, now the Plaintiff cannot use same reasons, for sale of the Property when all joint tenants are receiving income from the Property.
  24. In any event 2<sup>nd</sup> Defendant who is an unmarried sister of the Plaintiff also lives in the Property and considering inconclusive Psychiatrist report as to the management of finances by 2<sup>nd</sup> Defendant and her mental status, it is not in her best interest to allow a sale of her home. This Property is where she lived and continue to live and consider as her home. She is obviously feeling safe in that environment, and her objection for sale of the Property, is not without merit.
  25. She can be categorized as a vulnerable person, who needs special care by family members and at this moment losing her home, by way of a sale is not in her best interest.
  26. In my judgment this request for sale cannot be acceded, considering the best interest of all the parties. The Plaintiff cannot compel the Defendants for valuation of the Property as they are not interested for a sale so the request to bear the cost for such valuation is denied.

## CONCLUSION

27. The Originating Summons sought some orders for valuation of the Property and sale of the same in terms of Section 119 of Property Act. The Section 119(1) cannot be resorted by the Plaintiff as request for sale is not supported by 2/3 owners of the Property. In any event such request for sale of the Property can be granted in an action for partition. There was no action for partition, so the Originating Summons needs to be dismissed *in limine*. Without prejudice to that considering the facts before me at the hearing it is not in the best interest of all the parties to sell the Property. The action is dismissed. The cost is summarily assessed at \$1,000.

**FINAL ORDERS**

- a. The Originating Summons dismissed.
- b. The cost of this action is summarily assessed at \$1,000

**Dated at Suva this 26<sup>th</sup> day of July, 2017**



*Ameyi*  
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**Justice Deepthi Amaratunga**  
**High Court, Suva**