

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 303 of 2016

BETWEEN

ABDUL FARID KHAN of 1/4 Templeman Crescent, Hillsdale, NSW 2036,
Australia, Health Coordinator.

PLAINTIFF

AND

ABDUL SAMAD and ROZINA BIBI both of Lot 15 Petrie Road,
Namadi Heights, Tamavua, Suva, Team Leader and
Sales Representative respectively.

FIRST DEFENDANTS

AND

ATTORNEY-GENERAL OF FIJI, Suvavou House, Victoria Parade, Suva.

SECOND DEFENDANT

AND

THE REGISTRAR OF TITLES, Ground Floor, Civic Tower,

Victoria Parade, Suva.

THIRD DEFENDANT

Counsel : Mr M. A. Khan for the Plaintiff.
Mr S. Kumar for the 1st Defendants.
Ms S. Chand with Mr A. Prakash for the 2nd & 3rd
Defendant.

Date of Hearing : 03rd August, 2017

Date of Judgment : 06th September, 2017

JUDGMENT

[1] The plaintiff instituted these proceedings by Originating Summons seeking the following reliefs:

1. A declaration that the plaintiff was entitled to transfer his two undivided two twelfth share of his one undivided one fourth share in Certificate of Title No. 9499 being Lot 10 DP 2246 equally unto Nazima Bibi and Nazra Bibi.
2. A declaration that joint tenancy in the Certificate of Title No. 9499 being Lot 10 DP 2246 be severed and made into tenants in common.
3. An order that the 1st defendants produce and deliver to the court the original Certificate of Title No. 9499 being Lot 10 DP 2246 within

seven days from the date of such order for the registration of transfer with the Registrar of Titles office.

4. In the alternative, and order against the 1st defendants to produce and deliver to the 3rd defendant the Original Certificate of Title No. 9499 being Lot 10 DP 2246 within seven days from the date of such order, for registration of the transfer.
5. An order that the 3rd defendant do register the Transfer on the Duplicate Original Title accordingly.
6. Costs.

[2] The plaintiff is one of the registered proprietors of the property in dispute. The first defendants are his brother and sister. Abdul Gafoor, the father of the plaintiff and the 1st defendants died testate appointing his wife Zaida Bibi as the executor. Zaida Bibi, on 20th January, 2012 as the executor of the estate of late Abdul Gafoor executed a transfer whereby Zaida Bibi, 1st defendants and the plaintiff became entitled to the property and upon the death of said Zaida Bibi the plaintiff and the 1st defendants became entitled to equal shares of the property. These facts are not disputed by the parties.

[3] On the same day that is on 20th January, 2012 another transfer has been executed by, on the face of it, Zaida Bibi, the plaintiff and the 1st defendants adding a clause that was not found in the executor's transfer. The additional clause reads as follows;

...subject to such endorsements as aforesaid and to hold the same as **joint-tenants**. (Emphasis added).

[4] The plaintiff's position is that he did not subscribe his signature to this document and on the day this transfer was executed he was abroad. At the hearing of this matter the learned counsel for the 1st defendants submitted that the fact that the plaintiff did not participate in the execution of this transfer must be established by oral testimony and the proper course would have been writ of summons and not originating summons. I was also inclined to this argument of the learned counsel for the 1st defendants but when I considered the affidavit of the parties and especially the documents tendered by the 1st defendants annexed to their affidavits it appeared that the fact that the plaintiff was not even in the country on the day this transfer was executed had been clearly admitted by the 1st defendants and they have not disputed

that fact. In paragraph 6 of the affidavit in opposition of Abdul Samad it is stated as follows;

THAT it is through our generosity that we have included Abdul Farid Khan's name in the said title even though at the time of transaction was not present; he was the citizen of New Zealand, as he was the youngest.

[5] There is no doubt that this paragraph refers to the transfer by way of administration. However, since Abdul Samad has admitted that on the day it was executed the plaintiff was out of the country it is practically impossible for him to place his signature on the 2nd transfer which was executed on the same day. Not only in the affidavit but also in the letter written by the 1st defendants on 16th December, 2015 to the solicitors of the plaintiff, the 1st defendants have stated the same in paragraph 4 of the said letter. The court therefore holds that the 2nd document titled "TRANSFER" executed on 20th January, 2012 has no force or avail in law or at least the plaintiff is not bound by the terms and conditions contained in the said transfer.

[6] The next matter that needs the attention of the court is whether the "TRANSFER BY WAY OF ADMINISTRATION" executed by Zaida Bibi has the effect of creating a joint-tenancy.

[7] In the case of *Tirikula v Tirikula* [2011] FJHC 133; HBC374.2008 (3 March 2011) the High Court adopted the interpretation given to joint tenancy in the Black's Law Dictionary 6th Edition:

An estate in fee-simple, fee-tail, for life, for years or at will, arising by purchase or grant to two or more persons. Joint tenants have one and the same interest, accruing by one and the same time, and held by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession. The primary incident of joint tenancy is survivorship, by which the entire tenancy in the decease of any joint tenant remains to the survivors and at length the last survivor."

[8] The learned counsel for the 1st defendants submitted that the words "*equal shares and shares alike absolutely*" in the last will of late Abdul Gafoor indicates that the plaintiff and the 1st defendants inherited the property as joint tenants.

- [9] When a last will is interpreted the court must consider the last will in its entirety. The relevant part of the last will of Abdul Gafoor where he has expressed his intention reads as follows;

SUBJECT to the payment of all my just debts funeral and testamentary expenses I DEVISE AND BEQUEATH all my property real and personal of whatsoever nature and wheresoever situate or to which I may be entitled or over which I may have a disposing power at the time of my death UNTO my wife ZAIDA BIBI (Fathers name Juman Ali) shall survive me as tenant in common, and upon her death UNTO my children **ABDUL SAMAD, RIZINA BIBI AND ABDUL FARID KHAN** all of 15 Petrie Road, of Ragg Avenue, Tamauva, Suva, Lending Executive, Office Manager and Research Officer respectively in equal shares and shares alike absolutely.

- [10] From the above it appears that the testator, late Abdul Gafoor did not intend to create a joint tenancy in respect of the property in question. He has specifically stated in the last will that he and his wife were the tenants in common. On the other hand if a joint tenancy was created by the testator in his last will there was no reason for Zaida Bibi and 1st defendants to execute another transfer creating a joint tenancy.
- [11] The learned counsel for the 1st defendants relied on the interpretation of "joint tenancy" as given in "**Principles of Real Property Law**" by G.W. Hinde, N.R. Campbell, Peter Twist and D.W. McMorland according to which a joint tenancy arises under the following circumstances:

Whenever land is transferred inter vivos or devised by will to two or more persons without any words to show that they are to take distinct or separate shares or, to use the technical term, without "words of severance". Thus, if a parcel of land is transferred "to A and B" without the addition of any explanatory words, a joint tenancy is created. **By contrast if a transfer "to A and B in equal shares" is registered, the result is the creation of a tenant in common, not a joint tenancy.** (Emphasis added)

- [12] It is thus clear that by the last will of Abdul Gafoor does not have the effect of creating a joint tenancy among the plaintiff and 1st defendants but it remains a

tenancy in common and the plaintiff is entitled to dispose of his share as he wishes. Therefore, the question of severance does not arise for determination.

[14] On behalf of the 3rd defendant the learned counsel submitted that if the court orders the 3rd defendant will register the transfer of the plaintiff.


[15] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The plaintiff is entitled to transfer his share of the property or part thereof which is the subject matter of these proceedings to Nazima Bibi and Nazra Bibi.
2. The 1st defendants are ordered to produce the original Certificate of Title No. 9499 being Lot 10 DP 2246 to the 3rd defendant within seven days from today.
3. The 3rd defendant is ordered to register the proposed transfer by the plaintiff of his share of the property or part thereof.
4. The 1st defendants are ordered to pay the plaintiff \$2000.00 as costs of these proceedings.



06th September, 2017


Lyone Seneviratne

JUDGE