

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

CIVIL ACTION NO.: HBC 367 of 2017

BETWEEN : JUDITH JOY BISHELL

PLAINTIFF

AND : SHAMSHAD ALI

DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms P Narayan on instructions [Deven P Sharma]

DEFENDENT : Ms S Prasad [M.A. Khan Esq]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 06 September 2018

INTERLOCUTORY RULING

[An Application by the Plaintiff to Strike out the Counter Claim and An Application by the Defendant to Amend the Statement of Defence and Counter Claim]

INTRODUCTION

1. It is the Plaintiff's summons dated 29 January 2018 for orders to strike out the Defendant's counter claim as it:

[a] discloses no reasonable cause of action; or

[b] it is scandalous, frivolous or vexatious.

The application is made pursuant to Order 18 rules (1) (a) and (b) of the High Court Rules.

2. Following the said application the Defendant via it's summons dated 28 February 2018 seeks orders for leave to Amend its statement of defence and counter claim.

Said application is made pursuant to Order 20 rule 5 of the high Court Rules.

In her application for amendment, the Defendant informs that she was out of the Country in Australia hence could not properly convey the information to her solicitors.

Via the proposed amendment the Defendant forgoes the declaratory orders and states that the joint tenancy was severed with the death of Nisar Ali changing its status to tenancy in common.

She claims to have 50% share of the property under the right of Inheritance being the lawful wife of the Deceased, hence entitled to 50% of the rental income derived from the property from 26 April till to-date.

THE SUBSTANTIVE CLAIM AND DEFENCE WITH COUNTER CLAIM

3. As per the statement of claim the Plaintiff is claiming a sum of \$86,807.62 with interest on rental collected from 26 April 2011 till 31 March 2015 being \$12,080.00; interest at the rate of 4% from 01 April 2015 till 06 December 2017 being a sum of \$10,145.50 and daily interest of \$10.30 from date of issuance until payment.

4. The Plaintiff was married to one Nisar Ali [Mr Ali] on 10 December 1970. On 27 May 1982 she and Mr Ali bought a property comprised in NL 13788 being lot 13 on Tamavua Subdivision situated at 13 Matanikutu Place, Tamavua.

It is agreed fact by both parties that both the Plaintiff and Mr Ali were registered as joint lessees of the property.

There is a two storey building erected containing a maid's quarters and garage.

That sometimes on 05 July 1985, the Plaintiff and Mr Ali's marriage was dissolved.

Mr Ali continued to manage the property since 05 July 1985.

On or about 27 November 1989, Mr Ali married the Defendant.

Mr Ali passed away on 26 April 2011.

5. According to the Plaintiff, she became the sole proprietor and/or lessee of the property being the survivor of the joint tenancy.

The record of death of Nazir Ali was recorded on the property with the Registrar of Titles on 26 April 2011.

The Plaintiff further claims the Defendant has failed to make payment to the Plaintiff of the rental income and the Defendant failed to declare with the tax authorities the income so collected.

The Defendant is unjustly enriched and benefited from the rental collected.

As a result the plaintiff has suffered financial loss assessed at \$86,807.62.

The plaintiff also claims to have lost investment opportunity with minimum rate of 4% per annum.

6. The Defendants position is that she is not aware what kind of lease agreement there was. She continued to pay the bill according to the statements received from Native Land and the Suva City Council.

She claims to be managing the property for 38 years.

According to her, there as a deed of Family arrangement in which their son Richard Nasir Ali was appointed as Intended Administrator. The Deed also mentions that 50% of the deceased property shall go to Richard and Katherine.

According to her, the last tenant moved out in August 2011 and since then the property was not maintained and left unattended.

The Property became a drinking spot. Due to calls received from neighbours, the Defendant started to maintain the property with the undertaking that the same is still under the two children's name as per the draft deed.

She carried out the maintenance work on good faith that when Richard would contact her she will pay him the dues after deducting the total cost for repair and maintenance.

Neither the Plaintiff nor Richard wrote or stopped the Plaintiff from carrying out the maintenance.

She denies that property was on rent between April 2011 and March 2015.

In her initial counter claim she seeks following orders:

- i. A declaration that the Joint Tenancy registered on Native Lease 13788 being Lot 113 on Tamavua Subdivision situated at 13 Matanikutu Place, Tamavua of Nisar Ali on was severed with the death of Nisar Ali on 26 April 2011 effectively changing its status to tenancy in common;
- ii. A declaration that the Joint tenancy registered on the property of Nisar Ali was severed when the Plaintiff and the deceased's marriage was dissolved by the court on 05 July 1985;
- iii. A declaration that upon the death of Nisar Lai the Defendant was entitled to 50 per cent of the property under the right of inheritance being he lawful wife of the deceased;
- iv. A declaration that the defendant is entitled to 50 per cent of the rental income derived in the property from 26 April to to-date;
- v. The is to provide proper statement of income for the Estate of Nisar Lai;

DETERMINATION

7. In the case of Mishra Prasad Jas v Shant Ram and Shiu Ram as executor for the Estate of Ram Baran a Labasa Civil Action no HBC 34 of 2014, the Court dealt with the legal question concerning severance of joint tenancy. Late Ram Jas and late Ram Baran had bought a piece of land.

The parties then entered into an agreement to subdivide the land into two lots in which Lot 1 is to belong to Ram Baran and Lot 2 to Ram Jas . Apart from this agreement there was no legal severance of the title to the land into separate titles or as tenants in common, the land was still held by them as joint tenants. It

It was the implication of the death of Ram Jas and the attaching of the right to the property to the survivor Ram Baran that is now a concern for the plaintiffs who had sought declaratory orders that late Baran and Late Jas had held the title as tenant in common and not joint tenants.

The Court determined the nature of a Joint tenancy first and on paragraph 15 it stated:

“Joint tenancy on the other hand is characterized by what is termed "the four unities", unity of title, unity of time, unity of possession and lastly unity of interest. Unity of title means that co-ownership must be created by the same deed or instrument whilst unity of time depicts the simultaneous vesting of interest on the land. In a similar way the unity of possession means that each tenant has equal right to possession (similar to tenants in common) and lastly unity of interest means that each party must have the same type of interest, that is, one party cannot have a life interest whilst the other an estate in fee simple. (see Introduction to Land Law by Peter Butt 1980 Edition at page 169-170)”

The Court further on paragraph 16 stated the differences between joint tenancy from tenancy in common:

16. The two basic differences which distinguishes joint tenancy from tenancy in common is that firstly, there is no distribution of seisin under joint tenancy and secondly neither is there a right of survivorship. It is the second feature which is the most striking feature of joint tenancy, that is, the right of survivorship or "ius accrescendi".

17. What this means is that if one of the joint tenant dies the whole of the land held remains in the hands of the surviving joint tenant and is wholly seized (or possessed) by the surviving tenant. Hence "ius accrescendi" may appear to give an unfair advantage to the accident of a longer life which could only be defeated by disposition by one of the parties. In Fiji as in most common law jurisdictions for this disposition to be lawful it must be by a registered instrument.

The Court stated the following regarding severing the joint tenancy:

18. Registration is the key to legal disposition of this right to the property held as joint tenant. To successfully dispose of this right it must be done by an instrument registered with the register of titles. Section 37 of the Land Transfer Act Cap. 131 states that:-

No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.

19. In New South Wales an application to dispose of this right was made in McCoy -v- Estate of Peter Anthony Caelli (2008) NSW SC 986. In the above case the issue which came before the Court was "whether Mrs. McCoy has a seriously arguable case for a final injunction restraining registration of the transfer (of deposition) upon the basis that, the deceased having died before it was lodged let alone registered, her claim to be entitled by survivorship has priority". The facts of the case was that both

parties were registered as proprietors as joint tenants of a residential property at Port Macquarie in the State of New South Wales. Prior to his death Peter Anthony Caelli executed a will and signed a form of transfer unilaterally severing the joint tenancy in respect of the land.

20. He died three days before the transfer to unilaterally sever the joint tenancy was registered. The Court held that the joint tenancy remained on foot up to the moment of the deceased's death and therefore Mrs. McCoy is entitled to become registered by survivorship pursuant to s101 of the New South Wales Real Property Act. Section 101 recognizes that a surviving joint tenant becomes entitled to an estate or interest in land upon death of the other joint tenant and that entitlement is a precondition to registration.

21. What these provision does is recognize the principles of survivorship in joint tenancy. The New South Wales Real Property Act provides the mechanisms by which disposition of rights under joint tenancy can be attained. For instance when an application for disposition is made by only one of the parties (unilateral application) the Registrar is then required to inform the other party of this intention and failing objection the application is granted and registered, the joint tenancy is then severed.

22. However it still remains that a transfer or an application to sever the jointure remains inoperative until registration. Our Land Transfer Act does not provide for any mechanism to enable severance except the recognition of it by the fact of registration.

23. It appears that what is paramount in that jurisdiction before any severance by a unilateral application is granted is the need to obtain the consent or the concurrence of both parties. Only then will severance of the jointure be allowed. This is perhaps so because of the principle behind joint tenancy described by Peter Butt as the four "unities" and that is simply that both parties who hold proprietorship in land as joint tenants are joined in the rights which follow or flow from the jointure.

24. Therefore any application to sever the relationship must be by mutual agreement or concurrence. And further this concurrence or mutual agreement must be real and the intention must be shown in any document which appears to confer this severance of the jointure.....

28. Therefore in the absence of a legal alienation there must be an effective alienation of the interest and if it is by agreement then the agreement must be capable of being enforced.


8. Considering the above, I cannot agree with the Defendant's proposition that the joint tenancy was severed either on the death of Mr Ali or when his and the Plaintiff's marriage was dissolved thus effectively changing the status to tenancy in common.

9. There is no evidence from either the statement of defence and counter claim on foot; the proposed amended statement of defence and counter claim or the affidavit of the Defendant to suggest that Mr Ali during his lifetime after his marriage with the Plaintiff was dissolved, made any effort to sever the joint tenancy.
10. If this was the intention then there would have been an application made to that effect – could have been for property distribution etc.
11. Hence the only conclusion that can be drawn with the facts before this Court is that a surviving joint tenant [in this case the Plaintiff] becomes entitled to an estate or interest in the land upon the death of the other joint tenant [in this case Mr Ali].
12. Accordingly, I would agree with the Plaintiff's application that the Defendant's counter claim as well as the proposed amended counter claim [50% share in the property and 50% share in rental income] discloses no reasonable cause of action and is frivolous.

FINAL ORDERS

13. For this reason the counter claim is struck out and as well as the application to amend the counter claim.
14. The Defendant's statement of defence remains intact either wise.
15. Further I summarily assess costs against the Defendant at a sum of \$800 to be paid in 14 days to the plaintiff.




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Vandhana Lal [Ms]
Acting Master
At Suva.
06 September 2018