

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 43 of 2021

BETWEEN : **MELIKI RADINOCO WAQA** of 15 Kaunitoni Street, Lautoka, Retired,
Administration Officer.

PLAINTIFF

AND : **SERA SENTUVAKEI** of Yasawa Islands, Retired.

DEFENDANT

Appearances: Messrs Krishneel Patel Lawyers for the Plaintiff
Defendant in Person
Date of Hearing: 18 March 2022; 27 May 2022; 15 June 2022; 05 July 2022; 03 August 2022; 05
September 2022; 30 September 2022; 13 October 2022; 20 October 2022; 01 December
2022
Date of Ruling: 24 March 2023

R U L I N G

INTRODUCTION

1. The plaintiff (“**Meliki**”) co-owns a certain property with her sister (defendant, “**Sera**”). The property in question is comprised in Native Lease No. 14073 being Lot 58 Waiyavi Subdivision in the Tikina of Vuda in the Province of Ba containing an area of 34.7 perches (“**property**”). The property comprises of a top and bottom flat with a small store room attached to the bottom flat. The top and bottom flat each consist of three bedrooms, kitchen, dining area and bathroom.
2. Meliki and Sera are both advanced in age. Meliki occupies a small portion of the house. Sera’s grown up, unemployed children occupy the remainder of the house with their families whilst Sera resides (mostly) in Yasawa. For years, Sera and her family have been on bad terms with Meliki. This has regressed to a point where Meliki has had to take out DVRO proceedings in the Lautoka Magistrates Court. Meliki wants the house to be sold and the proceeds of sale divided in half. She wants to take her half share and leave Lautoka to go and live out the rest of her retirement in Suva with her son.

ORIGINATING SUMMONS

3. On 18 February 2021, Krishneel Patel Lawyers filed an Originating Summons for and on behalf of Meliki. The Summons seeks the following orders:
 - (i) that the property be sold.

- (ii) that Meliki's Solicitors appoint a registered valuer in consultation with Sera or her solicitors to value the Property and release a copy of the same to them.
- (iii) that Meliki then offer a first right of refusal to Sera to purchase and complete the sale of Meliki's share of the property at the prevailing market value contained in the valuation report or any lesser sum agreed upon by the parties within sixty (60) days from the date of the valuation report before resorting to sale of the property by way of tender.
- (iv) should Sera refuse to purchase Meliki's share of the property, Meliki shall then call for tenders by advertising the property for sale in two daily newspapers.
- (v) the property is to be sold to the tenderer with the best offer with the sale price to be not less than the market value as per the valuation report.
- (vi) Meliki's solicitors are to then prepare the suite of transfer documents on behalf of the parties.
- (vii) Sera shall execute the suite of transfer documents and if she refuses, the Deputy Registrar of the High Court at Lautoka shall then attend to execute the same on Sera's behalf.
- (viii) Meliki's solicitors shall furnish an account of the disbursements and costs incurred in the sale of the property to Sera and deduct the same from the sale proceeds before distributing the balance of the sale proceeds equally between the parties.
- (ix) the parties are to bear their own costs.
- (x) the parties are, thereafter, at liberty to parties to apply generally.

PLAINTIFF'S AFFIDAVIT

4. The Summons is supported by an Affidavit sworn by Meliki on 05 February 2021. I summarize below all that Meliki deposes at paragraphs 3 to 14:
 - (a) she financed the purchase of the property. In good faith, she gave half share to Sera. She annexes a copy of her FNPF withdrawal application. The money she withdrew was applied towards part of the purchase price. She also annexes a copy of the home loan bank statements showing mortgage repayments.
 - (b) she used to work for the Ministry of Health. She resided in a Government Quarters. During that time when she resided in the Government Quarters, Sera's family were residing in the bottom floor of the property. They were looking after the whole house. Sera herself resided most of the time in her village in the Yasawa Islands.
 - (c) when Meliki retired, she moved in to occupy the top floor of the property. The bottom floor was already occupied by Sera's son and his family.
 - (d) in 2016, Cyclone Winston, blew the roof off. The top flat was severely damaged and totally uninhabitable.

- (e) Meliki was not able to repair the damage to the top flat due to financial constraints and ill health. As a result, she was compelled to move down to stay in the small store room.
 - (f) ever since Meliki moved to the ground floor, Sera's son and his family have continually harassed Meliki. They put pressure on her to leave the property so they could then have the whole property to themselves.
 - (g) their relationship has only regressed over time. Meliki feels threatened and intimidated by Sera's son – to the point that Meliki has had to lodge a complaint at the Lautoka Police Station. This led to proceedings at the Lautoka Magistrates Court and a DVRO Order against Sera's son.
 - (h) Meliki does not wish to reside on the property due to the animosity with Sera's son. She is now 70 years of age.
 - (i) she wants the property to be sold so she relocate Suva where she wants to live her twilight years with her children. She has no source of income or savings.
 - (j) Meliki had tried twice before to sell the property but Sera's son advices Sera not to agree.
5. On 10 March 2021, Sera filed her Acknowledgement of Service. Shortly after that, Fiji went into a second lockdown around April 2021 due to the COVID-19 pandemic. This explains why, for the most part of 2021, there was no step taken in this case until 16 November 2021 when Krishneel Patel Lawyers filed a Notice of Appointment to act for Meliki.
6. Meliki's Summons was re-issued returnable on 12 January 2022. For one reason or another, the matter was called before me on 01 December 2021. Mr. P. Chauhan appeared for the Plaintiff. There was no appearance by the Defendant. I then adjourned the case to 12 January 2022.
7. On 12 January 2022, Mr. Chauhan appeared for Meliki. Sera appeared in person. I gave 21 days to Sera to file and serve an Affidavit in Opposition by 02 February 2022 and fourteen days thereafter to Meliki to file and serve an Affidavit in Reply by 17 February 2022. I then adjourned the case to 17 February 2022 for mention to fix a hearing date.

DEFENDANT'S AFFIDAVIT

8. On 16 February 2022, Sera filed her Affidavit in Opposition. She deposes as follows at paragraphs 2 to 29:
- (a) that she resides in 15 Kaunitoni Street, Lautoka. She always resided here since 1997 and has never resided in the Yasawa Islands. Initially, she was a tenant in a flat downstairs while Mr. Sada Nand, the previous owner, was occupying the bottom self-contained room. The top flat was rented out. Altogether there were three families living on the property.
 - (b) she is a retired employee at Lautoka Hospital.
 - (c) before Mr. Sada Nand left Fiji, he had expressed his interest to sell the property to her late husband, Ratu Meli Totoko. Ratu Meli passed away in the year 2000. At the time, Meliki was residing in Suva and was working as a Civil Servant with the Ministry of Health.
 - (d) in late December 2000, Meliki was in discussion with her (Sera) about purchasing the house together as joint owners. Meliki was the older of the two. Sera was agreeable.
 - (e) Sera then told Meliki that she (Sera) and her children had been paid their shares from Ratu Meli's FNPF funds. She (Sera) and two of her three children namely Kinisimere and

Ananaisa decided to each put in \$9000 to give to Meliki as Sera's contribution towards the purchase price.

- (f) Meliki did receive the \$27,000 contribution from Sera in early 2001. However, Meliki did not issue Sera any receipt. Meliki does not disclose this in her application. Sera said she handed the money over to Meliki in the presence of her three children namely Kinisimere, Ananaisa and Jonacani.
- (g) upon purchasing the property in 2001, it was agreed between Meliki and Sera that Meliki would own the top floor and Sera would own the bottom floor.
- (h) after her retirement in 2010, Meliki then decided to move into her top flat. For years before she moved in, Meliki had allowed her friends and family members to occupy the top flat.
- (i) there was no written agreement. They were sisters and all the arrangements were done in good faith. Sera said she gave Meliki her money that she and her two children had put together and consented to Meliki's proposal that she (Meliki) owns the top flat and Sera owns the bottom flat.
- (j) that is the reason why her (Sera's) name is registered in Lease No. 14073. Meliki was the one who was handling all the financial and the conveyance documentation at all material times.
- (k) in 2014, Meliki asked Sera to allow her (Meliki) to move in to a self-contained room downstairs in order that Meliki could rent out her portion of the property to the Government so she could earn some income therefrom. Sera said she agreed to this arrangement. However, Meliki did not offer Sera a single cent from the rent proceeds.
- (l) Meliki's DVRO application was later struck out as it had no merit.
- (m) on 20 February, 2016, the top flat of the property was partially damaged by Tropical Cyclone Winston.
- (n) Meliki applied for and received four (4) thousand dollars' worth of hardware materials through the Government rehabilitation assistance program. Meliki used the vouchers to purchase hardware materials which she later sold off to third parties and used up the proceeds all by herself.
- (o) at some point later, Meliki received four thousand dollars from overseas donors to pay for the Contractor who would do the repair and maintenance work.
- (p) lately, Meliki had made representations to Sera that there was a potential buyer wanting to purchase the property. Sera, however, had told Meliki that she (Sera) did not have any issues if Meliki could sell off her share of the property. Sera made it quite clear that she (Sera) did not wish to sell her share.
- (q) Sera's relationship with Meliki has only regressed. Meliki still currently resides in Sera's self-contained room at the lower flat for which Sera is paying for electricity, water and city rate and iTLTB rental without any financial contribution at all from Meliki since 2014.

9. On 16 February 2022, I granted Meliki a further twenty-one (21) days to file and serve an Affidavit in Reply. I then adjourned the case to 18 March 2022 for hearing at 10.00am.

PLAINTIFF'S AFFIDAVIT IN REPLY

10. On 17 March 2022, Meliki swore an Affidavit in Reply which she filed on the same day. She deposes as follows at paragraphs 3 to 6:

- (a) she does not agree with what Sera is saying about her (Sera's) contribution towards the purchase of the property. However, she is still willing to give half of the net sale proceeds to Sera since they are sisters.
- (b) she (Meliki) is ready to sell her share of the property. However, it is impractical since the property consisting of the land and the building cannot be divided into two equal parts for sale of her share in the property. The land is too small for subdivision. In any event, no buyer would want to purchase the top floor while the bottom floor belongs to a stranger.
- (c) in her old age of 71 years, she derives no joy in bringing this application for sale against her sister. However, she is forced to bring this application since she cannot continue to live in a storeroom for the remainder of her life when she can sell the property to get her share of sale proceeds and live her life comfortably.
- (d) the prevailing hostility by Sera and her family against her has strengthened her resolve to sell the property. She fears that the past and present court actions do not bode well for her future stay in the same property with Sera and family.

DIRECTIONS ON VALUATION

- 11. On 18 March 2022, I heard brief submissions from Mr. Patel and Ms. Sera and then made the following directions:
 - (i) fourteen (14) days to parties to file valuation of the property (by their respective registered valuers) i.e., by 01 April 2022.
 - (ii) Order in Terms of prayers (b) and (c) (see paragraph 3(ii) and (iii) above).
 - (iii) if the parties' valuations differ, the Court will then fix a price on 04 April 2022 based on the difference.
 - (iv) adjourned to 04 April 2022 for mention.
- 12. On 04 April 2022, I adjourned the matter to 21 April 2022. On 21 April 2022, the defendant Sera tendered in Court a valuation by Westate Consultants which valued the property at \$155,000. Krishneel Patel Lawyers also filed a valuation by Professional Valuations Pte Ltd of the property on the same day. This report valued the property at \$210,000.
- 13. I then adjourned the case further to 09 May 2022 for mention. On 09 May 2022, I adjourned the case further to 27 May 2022 for mention to see if the defendant has obtained Legal Aid Assistance.

RIGHT OF FIRST REFUSAL TO DEFENDANT

- 14. On 27 May 2022, Mr. Patel suggested that the defendant Sera should proceed to buy out the plaintiff Meliki's half share as follows:
 - (a) Plaintiff's valuation \$210,000 plus defendant's valuation \$155,000 = \$185,000.
 - (b) \$185,000 to be accepted by the Court as the valuation of the house.
 - (c) Plaintiff's half share in the \$185,000 = \$91,250.00.
 - (d) Defendant Sera to buy out plaintiff's half share at \$91,250.00.
- 15. The defendant Sera agreed to that proposal. I then adjourned the case to 15 June 2022 and directed the plaintiff to provide a Sale and Purchase Agreement at \$91,250.00 in 14 days.

16. On 15 June 2022, Mr. Patel advised the Court that he had prepared a Sale and Purchase Agreement which is yet to be executed by Ms. Sera. I then adjourned the case to 05 July 2022 for mention to see if Sera has executed the Sale and Purchase Agreement.

EXTENDING TIME TO DEFENDANT TO ARRANGE FINANCE OR FIND BUYER

17. On 05 July 2022, Sera advised the Court that she has had an operation in Ba in the past week and that she has found someone to buy the house. She also said that she has already sought legal advice. I then adjourned the case to 03 August 2022 for mention.
18. On 03 August 2022, Ms. Sera informed the Court that she had been trying to arrange finance from the Bank. It appeared that the person whom Sera had found to purchase the house was no longer interested. I then adjourned the case to 01 September 2022 for mention to check on Sera's loan application. Mr. Patel also tendered in Court a copy of the Sale and Purchase Agreement.
19. By 01 September 2022, Sera still had not furnished the Court with an offer letter from a Bank. She also informed the Court that her nephew/niece was no longer interested in purchasing the property.
20. I then adjourned the case to 30 September 2022 to see if Sera has obtained a loan offer from another Bank.
21. On 30 September 2022, Sera informed the Court that she still had not been able to obtain a loan from a Bank. It appears that at some point, when the nephew and niece had withdrawn their interest in purchasing the house, Sera's son had considered buying it. However, because they were all unemployed, they could not secure a loan. Mr. Patel however was adamant that Order in Terms be granted. He argued that Orders were made in March, 2022 and the time limit set had long expired. I granted Sera a final two weeks to arrange finance, failing which the Plaintiff would be free to pursue the tender process prayed for in the Summons. I then adjourned the case to 13 October 2022 for mention.
22. On 13 October 2022, Sera did not appear. Her son Jonacani however appeared and advised the Court that Sera was in Yasawa attending a village "soli". Mr. Chauhan appeared for Meliki and advised the Court that Meliki has arranged for a buyer.
23. I gave Sera a further two weeks and adjourned the case to 20 October 2022 for mention.

A BUYER'S OFFER TO PURCHASE

24. On 20 October 2022, Mr. Patel appeared and Sera appeared in person. Mr. Patel advised that there is an offer on the table to purchase the house for \$200,000. He said Meliki has signed the Sale and Purchase Agreement. Sera may take it home to consider and sign. Mr. Patel said he had worked out the mechanics as follows:

(a) \$200,000 – 00 (two hundred thousand dollars) – sale and purchase price.

- (b) CGT – 10% but since house has been the only place of residence, section 67 (1) (b) exemption applies.
 - (c) Nil stamp duty.
 - (d) \$100,000 each for Meliki and Sera.
 - (e) Meliki will bear conveyancing fees.
25. Sera sought a further two weeks adjournment. I refused. I granted Order in Terms of the Originating Summons except prayers (d) and (e) which are substituted by the Court's endorsement of the Sale and Purchase Agreement dated 19 October 2022 and duly executed by both parties and on the condition that Meliki and Sera be at liberty to live on the property rent free until 30 April 2023 and to vacate it forthwith on the expiry of that extended grace period.
26. I also directed Meliki to file and serve an affidavit upon completion of settlement to set out the accounts and then adjourned the case to 01 December 2022 to check on the progress of sale.
27. On 30 November 2022, Nacolawa & Company filed a Notice of Appointment for Sera. On 01 December 2022 Mr. Nacolawa appeared. He said he needed another two to three weeks to carry out another valuation. Mr. Patel said the Court is functus. I recall saying in Court that Mr. Nacolawa would have to apply to set aside the previous orders before he can succeed. The horse has bolted so to speak. To date, no application to set aside has been filed.

COMMENTS

28. A sale by tender is often ideal as it would allow the co-owners of a property such as Meliki and Sera to obtain an optimal price. However, the house in question has been in such a dilapidated state for many years. The top floor is totally uninhabitable and the entire house has been in such a bad state of disrepair for many years. It would require some extra expenses to restore the house. I am aware of the state of the house as I drive past it almost daily. Placing the house on tender would require some extra expenses. In its current state, the house would likely not fetch much on the market. The Banks have been unwilling to finance Sera's option to purchase the said property. While their reluctance may be based partly on their assessment of Sera's ability to service the loan, it could also be based in part on their assessment of the house as not having much of a security value. Against all that, it would appear that the offer to purchase the property at \$200,000-00 (two hundred thousand dollars) is fairly reasonable.

CONCLUSION & ORDERS

29. Upon hearing Mr. Krishneel Patel for the plaintiff and Ms. Sera Senituvakei for the defendant, and having considered the two different valuations tendered in Court by the parties, and having set the value of the house at \$185,000 based on the two valuations, and, accordingly, having assessed the value of the plaintiff's half share in the property at \$91,250-00, and having then given the defendant a right of first refusal to buy out the plaintiff's half share as assessed at \$91,250-00, and having extended time to the defendant to exercise that right of first refusal or, alternatively, to find a buyer to buy out the plaintiff's half share at \$91,250-00, and having considered the offer made to the plaintiff by Peekay's Investments Limited to purchase the property at \$200,000-00 (two hundred thousand dollars only) and having noted that this is still above the price of \$185,000 set by the Court based on the two valuations, I hereby Order and Direct as follows:

- (i) that the property be sold for \$200,000-00 (two hundred thousand dollars only)
- (ii) that Krishneel Patel Lawyers are to then prepare the suite of transfer documents on behalf of the parties.
- (iii) that the defendant shall then execute the suite of transfer documents and if she refuses, the Deputy Registrar of the High Court at Lautoka shall then attend to execute the same on the defendant's behalf.
- (iv) the plaintiff shall bear all the conveyancing fees as suggested by her solicitors on 20 October 2022.
- (v) Krishneel Patel Lawyers shall furnish an account of the disbursements and costs incurred in the sale of the property pay the defendant's half share of the sale proceeds being \$100,00-00 (one hundred thousand dollars) into Court
- (vi) the parties are to bear their own costs.
- (vii) the parties are, thereafter, at liberty to parties to apply generally.
- (viii) that the plaintiff and the defendant are at liberty to live on the property rent free until 30 April 2023 and to vacate it forthwith on the expiry of that extended grace period.
- (ix) that the plaintiff is to file and serve an affidavit upon completion of settlement to set out the accounts



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Anare Tuilevuka
JUDGE
Lautoka

24 March 2023