

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

**Civil Action No. HBC 78 of 2023**

**BETWEEN** : **ZAKIA ZOIREEN NISHA** of Naduru, Nausori, Fiji, Domestic Duties  
as the Executor and Trustee of the Estate of Abdul Haq late of 3 Nakasi  
Road, Nakasi

**Plaintiff**

**AND** : **ZAKIA ZOIREEN NISHA** of Naduru, Nausori, Fiji, Domestic  
Duties as the Administrator in the Estate of Abdul Altaf Haq late of  
Lot 127 Nakasi Road, Fiji, Retired, Deceased, Intestate

**2<sup>nd</sup> Plaintiff**

**AND** : **NARIZA ZUREEN KHAN** of Marinitawa, Ba, Fiji, Domestic  
As the Administrator in the Estate of Abdul Mustaq Haq late of  
Nakasi, Suva, Fiji, Joiner

**3<sup>rd</sup> Plaintiff**

**A N D** : **ABDUL MUNAF** of Lot 3, Nakasi Road, Nakasi.

**Defendant**

**Counsel:** Plaintiff: Mr. Nand. A  
Defendant: Ms. Tosokiwai. V

**Date of Hearing:** 16.08.2023

**Date of Judgment:** 29.09.2023

**JUDGMENT**

**INTRODUCTION**

1. Plaintiff is the administrator de bonis non (with a last will) of undivided half share of the land and building described in CT 16667(The Property). Defendant is the owner of remaining half of the Property and also residing in it. Plaintiff seeks sale of the Property and distribute the proceeds in terms of the shares respective parties hold in it. Second and third Plaintiffs are the beneficiaries of the estate of late Abdul Haq who was the registered undivided half share of the Property.

## FACTS AND ANALYSIS

2. Defendant is owner of undivided half share of the Property and residing on it.
3. Remaining undivided half share of the Property belonged to the estate of late Abdul Haq.
4. First Plaintiff was appointed as administrator of the estate of late Abdul Haq and had instituted this action in his capacity as administrator to distribute the estate in term of last will.
5. Second and third Plaintiffs are trustees of the estate of late Abdul Altaf Haq, and Abdul Mustaq Haq are entitled for their share in the said estate.
6. First Plaintiff has obligations to the estate of late Abdul Haq and second and third Plaintiffs.
7. Plaintiff is seeking a sale of the Property, but the Defendant is objecting for it. There are no reasons given in the affidavit in opposition for such objection. Defendant's long term possession of the Property is not a reason to refuse the sale of the Property.
8. Plaintiffs are seeking a sale of the Property through an order of the court in terms of Section 119 of Property Law Act 1971 which reads:

### **"ART XIII - 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)

9. A party having an interest in the Property can seek sale of the Property in terms of Section 119(2) of Property Law Act 1971. Plaintiff as the administrator have an interest in the Property.
10. In Thomas v The Estate of Eliza Miller & Tess Goulding [1996] 42 FLR 268 Pathik J discussed , the issue of ordering sale of property in terms of Section 119(2) of Property Law Act 1971 as follows;

**"I agree with Mr. Gago's submission that in s. 119(1), (2) and (3) provision is made for three separate kinds of action which can be maintained in relation to any property. I reject the defendants' contention that land can only be sold on a court order if there is "an action for partition and not otherwise", and therefore that an application under s. 119(2) must be based on an "action for partition".**

In England under the old law the Court had no power to decree sale instead of partition until the Partition Act, 1868 when the court was given power to order a sale. The views of the holders of the greater share prevailed, unless the minority could prove to the Court that their view was the most beneficial. Rules were laid down for the guidance of the Court which are similar to the provisions under our section 119(1), (2) & (3). In all these cases the Court had a discretion.

Where a large estate had to be divided among a few people, the expense was not heavy; but many cases have occurred where a small estate has been given (generally by Will), as in the case before me, to a very large number of persons, some of whom cannot be found, and in these cases the expenses were out of all proportion to the value of the estate. This produced numerous inconveniences and absurdities such as for example a house which was partitioned by actually building a wall up the middle (*Turner v*

*Morgan* [1803] EngR 490; (1803) 8 Ves 143, Lord Eldon LCis led to the passing of the Partition Act 1868 (31 & 32 Vict. C. 40) and the Partition Act 1876 under which the Court was given jurisdiction to order a sale of the property and distribution of the proceeds in lieu of making an order for partition. But since the Law of Property Act, 1925 the necessity for sale by the Court no longer exists in England, since, whenever several persons share land beneficially, it is now vested in trustees on trust for sale. Hence the Partition Acts no longer enable the Court to order a sale in a partition action but an action for partition can apparently still be brought, if occasion arises.”

11. There is a discretion given to court to order a sale if it thinks fit to do so, for the benefit of the parties. Discretion cannot be used arbitrary manner to allow or reject sale and force parties to partition of the Property. At the same time it is clear irrespective of a party's share, a sale can be ordered. In this action Defendant who owns half share is objecting to remaining half shareholders from obtaining a value for the inheritance in terms of last will of late Abdul Haq.
12. As tenants in common both parties to this action have equal interests in the land. Defendant is possessing the Property to the exclusion of Plaintiffs, who are entitled to half share. Defendant is also objecting to the sale of property on the basis that he and his family are possessing it. This shows that one common tenant is enjoying the entire fruits of the Property and objection was based on his unreasonable enjoyment of entire property.
13. It is clear that the objection of Defendant for a sale was not in the best interest of all the common tenants.
14. Objection of one or more common tenants is not an impediment, for the court to order sale of the Property in terms of section 119(2) of Property Law Act 1971. What is paramount is whether the sale would benefit parties who have interest in the Property.
15. The sale of the Property invariably, will dispossess Defendant who is enjoying it. The court needs to consider relative inconveniences to other co-owners, against benefits to the parties from such a sale.
16. From the affidavits both parties are unable to resolve dispute regarding their interests in the Property and Defendant who his having the duplicate title is not allowing registration of memorials. This is not a reason to reject this application.
17. If sale is not allowed Defendant will prolong enjoyment of entire property to the exclusion of second and third Plaintiffs. This is unjust.
18. In contrary, from a proper sale the parties will get an opportunity to enjoy their respective shares and interests.

19. It is common in a situation such as this, the party who is enjoying more than his share will face some inconvenience, but this need not to be an obstacle to the greater benefit to all the parties having an interest.

20. In *Thomas* (supra ) it was held,

"...The application here is under s. 119(2) under which sale of land under the direction of the court may be ordered if such sale is considered by the court to be "for the benefit of the parties interested" for the said section 119(2) clearly specifies the circumstances under which the Court could make an Order for sale notwithstanding the dissent or disability of any other party provided that "the sale would be for the benefit of the parties concerned". In the definition of "land" is included "all estate and interests in land" (section 2 of the Act).

In any consideration of the issue in this case the court acts on evidence and decisions will have to be reached on the basis of the evidence. On the affidavit evidence the Plaintiff has proved and satisfied the Court that s. 119(2) is available to her...

On the evidence I find that the defendants have not advanced any good reason why an order for sale of the flat should not be made.

The most practical solution to the problem which has plagued the parties for some time is to sell the property to the Plaintiff after valuation on terms and conditions hereafter appearing.

The Plaintiff I consider is entitled to the order she is seeking..."

21. Through a sale of the property both parties will benefit, as opposed to all benefits derived to Defendants. They would receive their entitlements from the sale and be able to utilize them according to their wishes, including acquire their own properties.

22. In *Atu v Atu* [1983] 29 FLR 100 the Court considered a similar application and discussed that:

"...Section 119(1) of the Property Law Act provides as follows:

"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."

Subject to one issue Mr. Knight raised which I will consider later, unless the Court sees good reason to the contrary, it is mandatory to direct sale of the property since the plaintiff's interest in the property is not less than one moiety.

A 'moiety means a half and the issue raised by Mr. Knight is that section 119 is not available to the plaintiff because he is a joint tenant and not a tenant in common entitled to a moiety or upwards of the property.

It is not necessary to enter upon a description of joint tenancies and tenancies in common because partition of land by the Court is available to persons having concurrent interests whether jointly or in common in a property.

Halsbury Laws of England Volume 21 first edition at p. 810 when describing the legal term "partition" says:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them."

In a note regarding co-owners, the author says:

"The co-owners may be joint tenants, tenants in common or co-partners."

23. Accordingly, Plaintiff as administrator and trustee of the estate are entitled to seek sale of the Property for distribution of the estate the shares of the beneficiaries of the estate of late Abdul Haq.

#### **CONCLUSION**

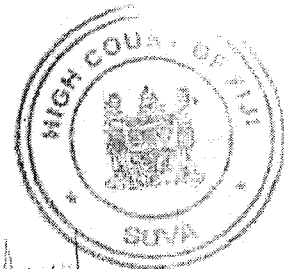
24. Plaintiff's application for sale of the Property is granted. Accordingly following orders are made. Cost of this action is summarily assessed at \$2,000 to be paid within 21 days.

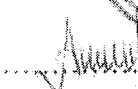
#### **FINAL ORDERS**

1. The Defendant to handover the Original Duplicate title being Certificate of Title No. 16667 to the Plaintiffs Solicitors forthwith;
2. The Plaintiff and Defendant to obtain a professional valuation for the Property. If parties are unable to agree to a the person or entity to do valuation, Deputy Registrar may name such entity or person for valuation of the Property.
3. Both parties are free to offer price of the valuation or higher price, and if both agree to same price, Defendant is given priority over Plaintiff on the basis of party in possession.
4. If neither party is in the position to purchase, to price valued, the property is to be sold to highest bidder (including the parties) through an auction.
5. If unsuccessful to sell among the two parties it is to be sold by public auction advertising in local daily papers at least twice on two weekends. The lowest price is valuation price.
6. The 1<sup>st</sup> Plaintiff and Defendant to execute the Transfer of Certificate of Title No. 16667 known as Nakasi (Part of) situate in the district of Naitasiri being Lot 3 on Deposit Plan No. 4324 comprising an area of thirty two perches and three tenth of a perch and all other incidental documents as being the registered proprietors of Certificate of Title No. 16667.

7. In the event if the any party fails to execute the transfer and all other incidental documents the Deputy Registrar, High Court of Fiji to execute the Transfer of Certificate of Title No. 16667 known as Nakasi (Part of) situate in the district of Naitasiri being Lot 3 on Deposit Plan No. 4324 comprising an area of thirty two perches and three tenth of a perch and all other incidental documents for and on behalf of the defaulting party as being one of the registered proprietors of Certificate of title No. 16667.
8. Proceeds received from the sale of the said property be used to clear any expenses involved in sale , the arrears of town rates with Town Council (if any) and utility bills of the said property including the legal fees of transfer after which proceeds are to be shared.
9. The residue of proceeds of sale be shared as follows:
  - a.  $\frac{1}{2}$  share of the proceeds be given to the 1<sup>st</sup> Plaintiff to distribute the proceeds equally between the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs;(1/4 for each )
  - b.  $\frac{1}{2}$  share of the proceeds be given to the Defendant;
10. Costs of this action is summarily assessed at \$ 2,000 to be paid by Defendant or deducted from his share of the Property.

Dated at Suva this 29<sup>th</sup> day of September, 2023.



  
Justice Deepthi Amaratunga  
High Court, Suva