

A

SOKIMI ATU

v.

EMILY ATU

B

[SUPREME COURT—Kermode J.,—25 January 1983]

Civil Jurisdiction

C

*Partition—Property Law Act S.119—available to joint tenant as well as tenants in common—mandatory to make order unless good reason contrary.*

*F. S. Lateef* for Plaintiff  
*P. I. Knight* for Defendant

D

Action by plaintiff husband against defendant wife in which he sought an order for partition of a residential property which had been purchased from the Housing Authority and of which the parties were joint tenants. Evidence did not disclose whether the property was held by a sub-lease of Crown Land by the Housing Authority or by lease granted by the Director of Lands; and if the latter, whether the lease was a protected lease within the meaning of Crown Lands Act S.13.

E

S.119(1) of the Property Law Act provided

“Where in an action for partition the party or parties interested . . . . . to the extent of one moiety or upwards in the land to which the action relates requests the court to direct a sale of 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.”

F

*Held:* Unless the Court sees good reason it is mandatory to direct a sale of the property.

The section is applicable whether the parties are joint tenants or tenants in common.

G

Ordered that the property was to be sold subject to the prior consent of the Housing Authority or Director of Lands.

The Court gave directions as to the procedure to be followed in making the sale.

H

Liberty to apply.

KERMODE. Mr Justice.

## Judgment

A

The parties are husband and wife but are presently living apart. They have since November 1972 owned, as joint tenants, a residential property which the plaintiff describes in his Statement of Claim as being Lot 102 on D.P. 3390 contained in Crown Lease 4233 at Raiwaqa, Suva.

There is mention in the Statement of Claim that the parties purchased the property from the Housing Authority.

B

The plaintiff commenced this action by writ instead of issuing originating summons for an order for sale of the property.

Ten months after Appearance had been entered, the plaintiff issued a summons seeking an order for partition of the property by way of sale. No defence has been filed. The summons was supported by an affidavit in which an order for sale was sought. The defendant has filed an affidavit in reply.

C

Counsel have agreed that I should decide this action on the affidavits which have been filed which would have been the procedure to be followed had the action been commenced by originating summons.

There is no dispute about the relevant facts but there is one omission.

D

I have no evidence as to whether the parties have been granted a sublease of Crown Land by the Housing Authority or whether they have a lease granted by the Director of Lands. If it is the latter situation, I do not know whether the Crown Lease is a 'protected lease' within the meaning of that term in section 13 of the Crown Land Act.

I can however, overcome the difficulty that that omission may have caused by making the order I propose to make subject to the consent of either or both the Housing Authority and the Director of Lands.

E

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."

F

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.

G

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.

H

A 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."

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

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

The plaintiff is entitled to an order for sale of the property unless the Court considers there are good reasons to the contrary.

C The defendant is presently living in the property and she states in her affidavit that if the house is sold she has nowhere to go unless she returns to her elderly parents' home which she does not want to do.

The defendant is presently unemployed and has not been working since May 1979. She was apparently employed by "Tiki Togs" in December, 1978. There is no explanation as to why she has not worked since May 1979 and I have to assume she is capable of working and earning a living for herself.

D There is no mention of any children of the marriage. the plaintiff is paying her \$12 a week for her maintenance under a Maintenance Order in Maintenance Action No. 151/74.

E I do not consider that the defendant has advanced any good reason why an order for sale of the property should not be made and the plaintiff is entitled to the order he seeks.

As the Statement of Claim discloses that the plaintiff also seeks an order for account, this judgment is an interim one dealing primarily with the sale of the property.

F As the plaintiff is in a better position to initially meet expenses involved in a sale of the premises, pending receipt of sale moneys, I propose to direct that the sale be handled by the plaintiff's solicitors after consulting the defendant's solicitors.

I direct and order that the property be sold subject to the prior consent of the Housing Authority and/or the Director of Lands being obtained.

I further direct as follows:

- G 1. The plaintiff's solicitors shall advertise the property for sale by written tender in at least two issues of a newspaper circulating in Fiji.
2. Tenders shall be opened in presence of the defendant's solicitors.
3. Sale shall be to highest tenderer who is to pay all costs and disbursements on transfer usually paid by a purchaser.
- H 4. On a tender being accepted, transfer shall forthwith be prepared by the defendant's solicitors who shall obtain his client's execution thereto and shall forward same to the plaintiff's solicitors who shall hold it in escrow until purchaser of property is in a position to settle.

5. Forthwith upon settlement the plaintiff's solicitors shall pay into Court the settlement moneys and furnish an account of the disbursements and costs incurred by the plaintiff in selling the property. A
6. Within one month after payment into Court of the said moneys, each party is to furnish to the other and file in Court his or her claim in respect of the sale moneys supported by documentary evidence of payments alleged to have been made or expenses incurred since purchase of the property. B
7. Liberty to parties to apply generally.

*Judgement for the Plaintiff.*